

CORNELL UNIVERSITY LAW LIBRARY

The Moak Collection

PURCHASED FOR

The School of Law of Cornell University

And Presented February 14, 1893

IN MEMORY OF

JUDGE DOUGLASS BOARDMAN

FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

Cornell University Library
KD 826.3.T91 1879

A selection of leading cases on real pro

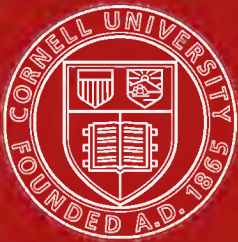


3 1924 021 642 107

law

This book was digitized by Microsoft Corporation in cooperation with Cornell University Libraries, 2007.

You may use and print this copy in limited quantity for your personal purposes, but may not distribute or provide access to it (or modified or partial versions of it) for revenue-generating or other commercial purposes.



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

A SELECTION
OF
LEADING CASES
ON
REAL PROPERTY, CONVEYANCING,
AND THE
Construction of Wills and Deeds:
WITH NOTES.

BY
OWEN DAVIES TUDOR,
OF THE MIDDLE TEMPLE, ESQ., BARRISTER AT LAW,
Author of "Leading Cases in Equity," "Leading Cases on Mercantile and Maritime Law,"
"The Law of Charitable Trusts," &c.

THIRD EDITION.

LONDON:
BUTTERWORTHS, 7, FLEET STREET,
Law Publishers to the Queen's most excellent Majesty.
HODGES, FOSTER & CO., GRAFTON STREET, DUBLIN.
CALCUTTA: THACKER, SPINK & CO. MELBOURNE: GEORGE ROBERTSON.
1879.

18702

LONDON :

PRINTED BY C. F. ROWORTH, BREAM'S BUILDINGS, CHANCERY LANE, E.C.

[DEDICATION TO THE FIRST EDITION.]

TO

SIR RICHARD BETHELL, M.P.,

Her Majesty's Solicitor General,

WITH THE GREATEST RESPECT

NOT ONLY FOR HIS

HIGH ATTAINMENTS AS AN ADVOCATE AND LAWYER,

BUT ALSO FOR

HIS UNCEASING EFFORTS

IN THE PROMOTION OF LEGAL EDUCATION

AND OF ALL

REALLY GREAT AND SYSTEMATIC REFORMS OF OUR LAW,

This Work

IS

(WITH PERMISSION)

DEDICATED BY

THE AUTHOR.

ADVERTISEMENT

TO THE THIRD EDITION.



THE Notes in this Edition have been carefully revised, and in some cases partially re-written.

The addition to the Notes consist of about one hundred and twelve pages.

The Index to the Statutes will, it is hoped, make the work more useful.

The number of Cases cited has been largely increased—and by means of the Addenda they have been brought down to the 31st of May, 1879.

MIDDLE TEMPLE,
June, 1879.

ADVERTISEMENT

TO THE SECOND EDITION.



IN this Edition the Notes have been carefully revised, and much new matter has been added, whenever the subject appeared to the Author to require further explanation or expansion. The additions made to the Notes consist of about one hundred and seventy pages.

The case of *Lord Braybroke v. Inskip*, with a Note on the subject of devises of mortgage and trust estates, has been added to this Edition.

The number of Cases cited has been largely increased, and the Author has brought them down to the latest period.

16, OLD SQUARE, LINCOLN'S INN,
Trinity Vacation, 1863.

PREFACE

TO THE FIRST EDITION.



THE selection of Leading Cases in Equity having been favourably received in this country, and also in the United States, where it was edited by two distinguished Members of the American Bar,* the present selection of Leading Cases on Real Property, Conveyancing, and the Construction of Wills and Deeds, has been made, to which Notes are appended in the same method as that adopted in the Leading Cases in Equity.

In so wide a field as that chosen for the subject of this Work, the Author has carefully endeavoured to select all those Cases the knowledge of which is of the greatest importance to the Real Property Lawyer and Conveyancer; and he ventures to hope that the Notes, as well as the Cases, may be found useful both to the Student and Practitioner.

16, OLD SQUARE, LINCOLN'S INN,
January, 1856.

* Mr. (now Mr. Justice) John Innis Clark Hare and the late Mr. Horace Binney Wallace.

LIST OF CASES REPORTED.

	PAGE
ALEXANDER <i>v.</i> ALEXANDER (<i>Excessive Execution of Powers</i>)	395
ATTORNEY-GENERAL <i>v.</i> SIR GEORGE SANDS (<i>Escheat—Forfeiture</i>)	760
BORASTON'S CASE (<i>Devise, whether Vested or Contingent</i>)	809
BOWLES'S (LEWIS) CASE (<i>Estates for Life—their Incidents</i>)	37
BRADLEY <i>v.</i> PEIXOTO (<i>Condition repugnant to Estate void</i>)	968
BRAYBROKE (LORD) <i>v.</i> INSKIP (<i>Trust and Mortgage Estates—when comprised in a General Devise</i>)	986
CADELL <i>v.</i> PALMER (<i>Executory Devise—Rule against Perpetuities</i>)	424
CLUN'S CASE (<i>Rents—Apportionment</i>)	284
CORBET'S (SIR MILES) CASE (<i>Commons</i>)	117
CORBYN <i>v.</i> FRENCH (<i>Charities—Mortmain Act, 9 Geo. 2, c. 36</i>)	519
DOE <i>d.</i> HISCOCKS <i>v.</i> HISCOCKS (<i>Extrinsic Evidence in construing Wills</i>)	918
EDWARDS <i>v.</i> SLATER (<i>Powers—different kinds of—their Extinguishment and Suspension</i>)	368
ELLIOT <i>v.</i> DAVENPORT (<i>Lapse</i>)	902
FORBES <i>v.</i> MOFFATT (<i>Extinguishment—Merger</i>)	943
FORTH <i>v.</i> CHAPMAN (<i>Failure of Issue, whether indefinite or at the death</i>)	682
FOX <i>v.</i> THE BISHOP OF CHESTER (<i>Advowson—Next Presentation—Simony</i>)	238
GARDNER <i>v.</i> SHELDON (<i>Estates by Implication</i>)	625
GRIFFITHS <i>v.</i> VERE (<i>Trusts for Accumulation</i>)	497

	PAGE
HANSON <i>v.</i> GRAHAM (<i>Bequest, whether Vested or Contingent</i>)	822
JONES <i>v.</i> WESTCOMB (<i>Executory Devise—Effect of failure of prior Gift upon</i>)	869
LEVENTHORPE <i>v.</i> ASHBIE (<i>Words conferring an Estate Tail in Real, give an absolute interest in Personal, Estate</i>)	861
MORLEY <i>v.</i> BIRD (<i>Joint-Tenancy—Tenancy in Common</i>)	876
PAWLETT, LADY <i>v.</i> PAWLETT, LORD (<i>Gift of Sum to be raised out of Real Estate, whether Vested or Contingent</i>)	816
RICHARDSON <i>v.</i> LANGRIDGE (<i>Tenancy at Will—From Year to Year</i>)	4
ROUSE'S CASE (<i>Tenant at Sufferance</i>)	1
SEYMOR'S CASE (<i>Estates of Inheritance</i>)	706
SHELLEY'S CASE (<i>Rule in Shelley's Case</i>)	589
STAPLETON <i>v.</i> CHEALES (<i>Bequest, whether Vested or Contingent</i>)	820
SURY <i>v.</i> PIGOT (<i>Easements</i>)	154
TALTARUM'S CASE (<i>Recovery—Entails</i>)	695
TYRRELL'S CASE (<i>Use upon a Use</i>)	335
TYRRINGHAM'S CASE (<i>Commons</i>)	120
VINER <i>v.</i> FRANCIS (<i>Gifts to Children as a Class</i>)	798
WILD'S CASE (<i>Rule in Wild's Case—Resolution in Wild's Case</i>)	669

LIST OF CASES CITED.

A.		PAGE	
ABBEY <i>v.</i> Petch	325	Albemarle (Earl of) <i>v.</i> Rogers	265, 274
Abbot <i>v.</i> Massie	942	Alchin's Trusts, In re	583
Abergavenny (Earl of) <i>v.</i> Brace	756	Aldaker <i>v.</i> Hunt	217
Abergavenny's (Lord) Case	884, 890	Aldenburgh <i>v.</i> Peaple	319
Abington's Case	763, 767	Aldred's Case	203
Abraham <i>v.</i> Bubb	115	—— In re	305, 306
Abrams <i>v.</i> Winshup	722	ALEXANDER <i>v.</i> ALEXANDER ..	395
Abrey <i>v.</i> Newman	898	—— 403, 405, 478, 837	
Absor <i>v.</i> French	219	—— <i>v.</i> Brame 554, 559, 564,	654
Achison <i>v.</i> Henry	133	—— <i>v.</i> Mills	384
Ackerman <i>v.</i> Burrows ..	896, 913	Aleyn <i>v.</i> Belchier	412, 423
Ackers <i>v.</i> Phipps	662, 839	Alford <i>v.</i> Vickery	11, 29, 32
Ackland <i>v.</i> Lutley	366	Allan <i>v.</i> Backhouse	93, 94, 95
Ackroyd <i>v.</i> Smith	169	—— <i>v.</i> Gomme	205, 206, 221
—— <i>v.</i> Smithson	367, 910, 928	Allaway <i>v.</i> Wagstaffe	211
Acocks <i>v.</i> Phillips	298	Allen <i>v.</i> Allen	53, 55, 56
Acton <i>v.</i> Blundell	196	—— <i>v.</i> Bewsey	353
Adams <i>v.</i> Adams ..	358, 359, 406,	—— <i>v.</i> Callow	800, 913
410, 416, 602, 662, 664, 665		—— <i>v.</i> Donelly	133
—— <i>v.</i> Andrews	171	—— <i>v.</i> Flicker	325
—— <i>v.</i> Angell 953, 961, 963, 964		—— <i>v.</i> Hill	8
—— <i>v.</i> Grane	314	—— <i>v.</i> Webster	932
—— <i>v.</i> Jones	939	Alleyne <i>v.</i> Alleyne	668
—— <i>v.</i> Lambert	541	Allgood <i>v.</i> Blake	613
—— <i>v.</i> Robarts	851	Allin <i>v.</i> Crawshay	645
Adamson <i>v.</i> Gally	202	Alloway <i>v.</i> Alloway 413, 422, 888,	897
Addison <i>v.</i> Busk	655	Allwood <i>v.</i> Heywood	88
Addlington <i>v.</i> Cann	564	Alpass <i>v.</i> Watkins	605, 609
Adnam <i>v.</i> Cole	538	Alsop <i>v.</i> Bell	954
—— <i>v.</i> Sandwich (Earl of) ..	334	Alston <i>v.</i> Atlay	278
Adney <i>v.</i> Field	113	—— <i>v.</i> Grant	218
Adshead <i>v.</i> Willetts	720, 726	Alt <i>v.</i> Gregory	898
Advocate-Gen. of Bengal <i>v.</i>		Altham <i>v.</i> Anglesey	341
Ranee Surnomoye Dossee ..	787	Ambrose <i>v.</i> Hodgson	905
Agar <i>v.</i> Fairfax	264, 881, 893	Amesbury <i>v.</i> Brown	754
Agassiz <i>v.</i> Squire	407	Amherst's Trusts, In re	980
Ainslie <i>v.</i> Harcourt	95, 96	Amherst <i>v.</i> Lytton	836
Aistrop <i>v.</i> Aistrop	605	Amburst <i>v.</i> Darnelly	836
Albany's Case ..	373, 377, 388, 389	—— <i>v.</i> Dawling	267
Albany <i>v.</i> St. Asaph (Bishop of)	269, 271		

	PAGE		PAGE
<i>Amies v. Skillern</i>	883, 889	<i>Arkwright v. Gell</i>	167, 185, 188, 199, 200
<i>Ancona v. Waddell</i>	981	<i>Arlett v. Ellis</i>	140, 141, 144
<i>Anderson's Case</i>	754	<i>Armitage v. Coates</i>	493
<i>Anderson v. Anderson</i>	613	— <i>v. Williams</i>	803, 805, 807
— <i>v. Midland Rail. Co.</i>	14	<i>Armstrong's Case</i>	767
<i>Andree v. Ward</i>	654, 655, 692	<i>Armstrong v. Armstrong</i>	679, 680, 888, 892, 896
<i>Andrew's Will, In re</i>	862, 867	— <i>v. Eldridge</i>	898
<i>Andrew v. Andrew</i>	466, 646, 753, 837	— <i>v. M'Inherheny</i>	27
— <i>v. Southouse</i>	726	— <i>v. Wolsey</i>	342
— <i>v. Trinity Hall</i>	567	<i>Armytage v. Wilkinson</i>	843
— <i>Re</i>	855	<i>Arnold's Estate, Re</i>	651, 664, 726, 844
<i>Andrews v. Dobson</i>	929	<i>Arnold v. Att.-Gen.</i>	573
— <i>v. Fulham</i>	870	— <i>v. Blaker</i>	219
— <i>v. Hailes</i>	150	— <i>v. Chapman</i>	544, 553, 559, 564, 565
— <i>v. Paradise</i>	170	— <i>v. Congreve</i>	476, 492
— <i>v. Partington</i>	524, 802, 805	— <i>v. Holbrook</i>	218, 219
<i>Anger's (Sir Anthony) Case</i> . . .	763	<i>Arnott v. Bleasdale</i>	508
<i>Angerstein v. Hunt</i>	109	<i>Arrow v. Mellish</i>	898
<i>Anglesey's (Marq. of) Estates,</i> <i>In re</i>	307	<i>Arrowsmith's Trusts, Re</i>	997
<i>Angus v. Dalton</i>	162, 180, 189, 213, 214, 236	<i>Arthington v. Chester (Bishop</i> <i>of)</i>	257
<i>Anonymous, 3 Atk. 15</i>	105	— <i>v. Coverley</i>	265
— <i>Dyer, 99 b</i>	605	— <i>v. Fawkes</i>	141
— <i>Dyer, 250 b</i>	260	<i>Arthur v. Lamb</i>	899
— <i>Dyer, 259 a</i>	258	<i>Arundel's (Lord) Case</i>	3
— <i>Dyer, 303 b</i>	657	<i>Arundel v. Steere</i>	135
— <i>2 Eq. Cas. Abr.</i> <i>522</i>	78, 171	<i>Arundell v. Falmouth (Lord)</i> . .	147
— <i>2 Freem. 224</i>	416	<i>Aschcroft v. Bourne</i>	34
— <i>2 Freem. 278</i>	115	<i>Ashburner v. Wilson</i>	651
— <i>1 Giff. 392</i>	784	<i>Ashburnham v. Bradshaw</i>	553
— <i>Godb. 4</i>	147	<i>Ashford v. Haines</i>	898
— <i>Gouldsb. 139</i>	669	<i>Ashley v. Ashley</i>	480, 651, 660, 835, 898
— <i>Jones, Sir W. 296</i>	218	<i>Ashmore's Trusts, In re</i>	849, 850
— <i>4 Leon. 2, pl. 2</i>	342	<i>Ashmore v. Hardy</i>	323
— <i>Lofft, 71</i>	380	<i>Ashton v. Jones</i>	545
— <i>Mo. 615</i>	379	— <i>v. Langdale (Lord)</i>	560, 561
— <i>Mos. 237</i>	112	— <i>v. Wood</i>	1007
— <i>2 Vent. 363, 365</i>	834, 894	<i>Aspden v. Seddon</i>	210, 228
— <i>1 Vern. 233</i>	51	<i>Aspinall v. Bourne</i>	554
— <i>3 Wils. 126</i>	145	— <i>v. Duckworth</i>	907, 912, 913
— <i>Winch, 3</i>	204	— <i>v. Petvin</i>	641, 642
<i>Anstee v. Nelms</i>	934	<i>Astley v. Milles</i>	953, 955, 958, 959, 963
<i>Anthony v. Rees</i>	356	<i>Aston v. Aston</i>	115
<i>Appleton v. Rowley</i>	61, 62, 905, 908	— <i>v. Smallman</i>	887
<i>Ap Rice's Case</i>	107	— <i>v. Wood</i>	572, 582
<i>Arcedeckne v. Kelk</i>	232	<i>Atcheson v. Atcheson</i>	990
<i>Archer's Case</i>	40, 622, 752	<i>Atherton v. Pye</i>	657, 658
<i>Archer v. Legg</i>	898		
<i>Arden v. Wilson</i>	149		

	PAGE		PAGE
Athol v. Midland Great Western of Ireland Railway Company.....	172, 200	Att.-Gen. v. Christ's Hospital..	574
Atkins v. Hiccocks	847	— v. Clarke.....	535, 573
Atkinson v. Baker	51	— v. Cock.....	522, 542, 576
— v. Barton	648, 659	— v. Comber	536, 537
— v. Holtby	648, 659	— v. Coopers' Company	574
— v. Hutchinson..	684, 686, 862	— v. Cordwainers' Company	574, 575
— v. King	173	— v. Coventry (Mayor of)	573
— v. Paice	646	— v. Crispin	803, 851
— v. Turner.....	845	— v. Crofts	790
Attack v. Bramwell	322, 329	— v. Cullen.....	588
Attenborough v. Attenborough	484, 485	— v. Cumming..	266, 267, 273
Attorney v. Berryman	399	— v. Darell.....	953
Att.-Gen. v. Andrew..	9, 525, 531, 616	— v. Davies..	554, 555, 556, 559, 581
— v. Andrews	553, 567, 577	— v. Day	532, 547, 548
— v. Bacchus	901	— v. Delaney	543
— v. Barnsley	217	— v. Doughty	203
— v. Baxter..	537, 541, 573, 577	— v. Downing.....	577
— v. Bayley	650, 654	— v. Drapers' Company	574
— v. Berwick-upon-Tweed (Corporation of) ..	576	— v. Drummond.....	583
— v. Beverley (Corporation of).....	575	— v. Duplessis	769
— v. Birmingham (Borough of).....	217	— v. Exeter (Corporation of).....	535
— v. Blizard	535	— v. Fishmongers' Company	541, 568, 574, 584
— v. Boulton ..	573, 578	— v. Fletcher	896
— v. Bovill	535, 579	— v. Floyer.....	267
— v. Bowyer....	567, 1009	— v. Forster	265, 266
— v. Bradford Canal (Proprietors of) ..	217	— v. Freeman.....	573
— v. Brandreth	535	— v. Gascoigne ..	574, 575
— v. Brazenose College	575	— v. Gilbert	574, 720
— v. Brereton	537	— v. Gill	469, 862
— v. Bright	617, 867	— v. Gladstone	542
— v. Bristol (Mayor of)	574, 575, 584	— v. Glasgow College .	578
— v. Buller..	987, 988, 989, 991, 992	— v. Gleg	573
— v. Bunce	584	— v. Glyn	545, 578
— v. Burdett	577	— v. Goddard	558
— v. Bushby	539, 578	— v. Goulding	558, 574, 581
— v. Butler.....	987	— v. Gradyll	379
— v. Caius College ..	574	— v. Great Eastern Railway Company	192
— v. Caldwell....	527, 559	— v. Greenhill	495, 971
— v. Cast Plate Glass Co.	934	— v. Grocers' Company	574
— v. Catherine Hall	574, 971	— v. Guise	577
— v. Chester (Bishop of)	523, 554, 581	— v. Haberdashers' Company	540, 574
		— v. Hall	973
		— v. Hankey	579
		— v. Harley ..	553, 554, 559
		— v. Heartwell	554
		— v. Heelis.....	538
		— v. Herrick	573
		— v. Hickman	542, 573

	PAGE		PAGE
Att.-Gen. v. Highgate School		Att.-Gen. v. Munby	544, 545, 546,
(Wardens, &c. of) .	571		554, 567
— v. Hinxman	556, 559, 581	— v. Nash	555
— v. Hird	862	— v. Newcombe	265, 266, 267
— v. Hodgson	554, 555, 556,	— v. Northumberland	
	558, 872	(Duke of) .	536, 579
— v. Hotham	535	— v. Oakaver	538
— v. Hughes	537, 577	— v. Oglander	581
— v. Hull	556	— v. Oxford (Bishop of)	522,
— v. Hutchinson	523		524, 530, 554, 580
— v. Hyde	554	— v. Painters' Company	537
— v. Ironmongers' Com-		— v. Parker	265, 266, 537, 583
pany	537, 578, 581	— v. Parsons	554, 555, 557,
— v. Jesus College, Cam-			559
bridge	575	— v. Pearson	584
— v. Jesus College, Ox-		— v. Philpott	555
ford	574, 575	— v. Poulden	507, 510, 512
— v. Johnson	574	— v. Power	541, 566, 567
— v. Kingston - upon -		— v. Price	536, 573
Thames	217	— v. Rance	573
— v. Köhler	784, 785	— v. Ruper	537
— v. Lawes	542, 578	— v. Rutter	265
— v. Leconfield (Lord)	278	— v. Rye	577
— v. Lee	577	— v. St. Cross (Masters,	
— v. Leeds (Duke of) .	778	&c. of) .	584
— v. Lichfield (Bishop		— v. St. John's Hospital	
of) .	267, 282		580, 584
— v. Llandaff (Bishop		ATT.-GEN. v. SANDS (SIR GEORGE)	760
of) .	578		
— v. London (Bishop of)	259		366, 738, 742, 769
— v. London (City of) .	537	— v. Scott	263, 266, 267
— v. London (Mayor,		— v. Sheffield Gas Con-	
&c. of) .	578	sumers' Company	216
— v. Lonsdale (Earl of)	195,	— v. Sidney Sussex Col-	
	536	lege	536, 584
— v. Love	583	— v. Sitwell	257
— v. Luton Board of		— v. Skinners' Company	574
Health	217	— v. Smithies	574, 583
— v. Mansfield	571	— v. Sparks	574
— v. Marchant	574	— v. Stepney	537
— v. Margaret & Regius		— v. Stewart	566
Professors in		— v. Sturge	586
Cambridge	536	— v. Sutton	648, 653
— v. Marlborough (Duke		— v. Syderfen	585
of) .	105, 115, 753	— v. Tancred	566, 567
— v. Mathias	137, 188	— v. Thames (Conserva-	
— v. Matthews	535, 573, 585	tors of the River)	195
— v. Merchant Venturers'		— v. Todd	541, 542
Company	574	— v. Tomkins	553
— v. Meyrick	527, 559	— v. Tomline	150
— v. Mill	566, 568	— v. Trinity College,	
— v. Minshall	574	Cambridge	575
— v. Moor	545, 566	— v. Tyndall	566
— v. Mountmorris (Id.)	562	— v. Vigor	993, 994, 1009

	PAGE		PAGE
Att. Gen. <i>v.</i> Vint.....	535	Bagnall <i>v.</i> London & North Western Railway Company	211
— <i>v.</i> Vivian.....	537	Bagot <i>v.</i> Bagot	109, 111
— <i>v.</i> Ward	545, 548	— <i>v.</i> Legge	687
— <i>v.</i> Wax Chandlers' Co.	574	Bagshaw <i>v.</i> Spencer	355, 356, 842
— <i>v.</i> Webster	535	Bagwell <i>v.</i> Dry	910
— <i>v.</i> Weymouth (Lord)	532,	Baile <i>v.</i> Coleman	606
	553, 565	Bailey <i>v.</i> Appleyard	169, 190
— <i>v.</i> Whitechurch	555, 558	— <i>v.</i> Lloyd	411, 418
— <i>v.</i> Whorwood..	536, 567	— <i>v.</i> Richardson.....	958, 963
— <i>v.</i> Wilkinson ..	535, 573	— <i>v.</i> Stephens	136
— <i>v.</i> Williams ..	556, 557	Bailis <i>v.</i> Gale	724, 726
— <i>v.</i> Wilson	570, 574	Bain <i>v.</i> Lescher	679, 809, 915
— <i>v.</i> Winchelsea (Earl of)	559, 574	Bainbridge <i>v.</i> Ashburton (Lord)	994
— <i>v.</i> Windsor (Dean and Canons of)	575	— <i>v.</i> Cream	835
— <i>v.</i> Worcester (Bishop of)	580	Bainton <i>v.</i> Bainton.....	656
Attree <i>v.</i> Hawe	561	Bainton's Case,	344
Attwater <i>v.</i> Attwater	641, 642, 972	Baird <i>v.</i> Fortune.....	175
Aubin <i>v.</i> Daly	69, 294	— <i>v.</i> Williamson	198
Audley's Case	342, 344	Baker <i>v.</i> Bayley	54
Audsley <i>v.</i> Horn.....	677, 680	— <i>v.</i> Brent	264
Aumble <i>v.</i> Jones	469, 719	— <i>v.</i> Gibson.....	888
Austin <i>v.</i> Amhurst	143	— <i>v.</i> Hanbury.....	916
Austyn <i>v.</i> Twyne	260	— <i>v.</i> Holtzaffell	332
Aveling <i>v.</i> Knipe	885	— <i>v.</i> Mounford	280
Avelyn <i>v.</i> Ward	871, 872, 874	— <i>v.</i> Parson	359
Avenell <i>v.</i> Croker	325	— <i>v.</i> Raimond.....	724
Avern <i>v.</i> Lloyd	480	— <i>v.</i> Rogers .244, 248, 277, 278,	280
Avison <i>v.</i> Holmes	979, 982	— <i>v.</i> Sutton	558, 567
Awse <i>v.</i> Melhuish	720	— <i>v.</i> Tucker	470, 651
Ayle's Trusts, In re	932	— <i>v.</i> Walker	300
Aylwin's Trusts, In re ..	387, 388,	— <i>v.</i> Wall	751
	803, 979, 982	— <i>v.</i> White ..353, 354, 355, 359,	360
Aynesley <i>v.</i> Glover	185, 202, 226, 235	Baldwin <i>v.</i> Baldwin ..98, 555, 557,	570
Aynsley <i>v.</i> Wordsworth	302	— <i>v.</i> Rogers476, 801, 804	
Ayray <i>v.</i> Sir R. Lovelas.....	254	Ball <i>v.</i> Comberbach	864
Ayton <i>v.</i> Ayton	803	— <i>v.</i> Cullimore	12, 19
		— <i>v.</i> Herbert	178
B.		Ballacorkish Silver Lead, &c. Company <i>v.</i> Harrison ..	196, 197
Babington's Case....	763, 769, 770	Ballard <i>v.</i> Dyson.....	206
Back <i>v.</i> Stacey.....	225	Balm <i>v.</i> Balm	801
Backhouse <i>v.</i> Bonomi.....	207	Balston <i>v.</i> Bensted	196
— <i>v.</i> Wells	617	Bamfield <i>v.</i> Popham	648
Bacon <i>v.</i> Cosby	616	Bamford <i>v.</i> Chadwick	686
— <i>v.</i> Proctor	478	— <i>v.</i> Lord	686
Baddeley <i>v.</i> Gingell	935	Bank's Trust	867
— <i>v.</i> Leppingwell	721	Bankes <i>v.</i> Holme	468, 475
Badger <i>v.</i> Ford.....	141, 149	— <i>v.</i> Le Despencer (Baro- ness)	493, 757
— <i>v.</i> Lloyd.....	466, 468	Bankhart <i>v.</i> Houghton	171
Badham <i>v.</i> Mee	380, 381		
Bagley <i>v.</i> Mollard	928, 932		

	PAGE		PAGE
Bankhart <i>v.</i> Tennant	172	Barwicke <i>v.</i> Foster	291, 301
Bannister <i>v.</i> Hyde	322	Basset <i>v.</i> Basset	65, 261, 301
Barber, <i>Ex parte</i>	997	Bassil <i>v.</i> Lister	509
—— <i>v.</i> Barber	915	Bastard <i>v.</i> Proby	661
—— <i>v.</i> Whiteley	217	Basten <i>v.</i> Carew	34
—— <i>v.</i> Wood	941	Bateman's Trusts, <i>In re</i> ..	791, 792
Barclay <i>v.</i> Maskelyne	535	Bateman <i>v.</i> Bateman	71
Bardon <i>v.</i> Bardon	849	—— <i>v.</i> Gray	806, 807
Barker <i>v.</i> Barker	65	—— <i>v.</i> Hotchkin..	108, 111, 489, 491, 514
—— <i>v.</i> Giles.....	896, 897, 899	—— <i>v.</i> Roach	723
—— <i>v.</i> Greenwood	355	Bates <i>v.</i> Bates	69
—— <i>v.</i> Lea	850, 853, 911	Bateson <i>v.</i> Green.....	139
—— and Cooke <i>v.</i> London		Batsford <i>v.</i> Kebbel	849
(The Bishop of)	263	Batteste <i>v.</i> Maunsell	55, 56
—— <i>v.</i> Richardson 181, 182, 185		Batty <i>v.</i> Fay	791
—— <i>v.</i> Venables.....	1001	Bawderok <i>v.</i> Mackaller ..	277, 279
Barkley's (Lord) Case	711	Baxendale <i>v.</i> McMurray..	216, 236
Barkworth <i>v.</i> Young	917	Baxter <i>v.</i> Brown	561
Barlow <i>v.</i> Grant	524	—— <i>v.</i> Losh	661
—— <i>v.</i> Orde	932	Baxter's Trusts	843
—— <i>v.</i> Rhodes ..	175, 179, 180	Bayley <i>v.</i> Bradley	11
—— <i>v.</i> Salter	686, 688	—— <i>v.</i> Snelham	930, 931
Barnaby <i>v.</i> Tassell	803	—— <i>v.</i> Fitzmaurice	12
Barnardiston <i>v.</i> Carter	841	Baylis <i>v.</i> Attorney-General	573, 920
Barnes <i>v.</i> Allen	851, 854, 887	—— <i>v.</i> Tyssen-Amhurst....	131
—— <i>v.</i> Bond	101	Beachcroft <i>v.</i> Beachcroft..	920, 931, 938
—— <i>v.</i> Jennings	872, 875	Beadel <i>v.</i> Perry	225, 227
Barnet <i>v.</i> Barnet 641, 642, 843, 845		—— <i>v.</i> Pitt	299
Barnett, <i>Re</i>	584	Beadsworth <i>v.</i> Torkington	131, 143
—— <i>v.</i> Blake	793, 978, 979	Beale <i>v.</i> Sanders	25
—— <i>v.</i> Tugwell	931	—— <i>v.</i> Symonds	777
Barnshaw's Trust, <i>In re</i>	850	Beales <i>v.</i> Crisford	678
Barret <i>v.</i> Glubb 247, 253, 265, 276,	277	Bean <i>v.</i> Bloom	134
Barrett <i>v.</i> Buck	512	Beard <i>v.</i> Westcott 409, 441, 445, 449,	456, 459, 460, 490, 494
Barrington's Settlement, <i>In re</i>	88	Beardsley <i>v.</i> Beynon	871
Barrington <i>v.</i> Liddell 514, 515, 518		Bearpark <i>v.</i> Hutchinson	53
—— <i>v.</i> Tristram	805	Beasley <i>v.</i> Clarke	188, 189
Barron <i>v.</i> Barron	717	Beaundlerk <i>v.</i> Dormer	683
—— <i>v.</i> Constable	389	Beandely <i>v.</i> Brook	170
Barrow <i>v.</i> Barrow	388	Beaufert (Duke of) <i>v.</i> Patrick	171
—— <i>v.</i> Greenough	928	Beaufoy's Estate, <i>In re</i>	97
—— <i>v.</i> Wadkin.....	781, 782	Beaulieu (Lord) <i>v.</i> Cardigan	
Barry, <i>In re</i>	751	(Lord)	804
—— <i>v.</i> Edgeworth	724	Beauman <i>v.</i> Kinsella	133
—— <i>v.</i> Lowry	190	—— <i>v.</i> Stock	661
Bartholomew, <i>In re</i>	845, 846	Beaumont's Trusts, <i>In re</i>	557, 558
Bartleman <i>v.</i> Murchison	804	Beaumont <i>v.</i> Fell 919, 924, 934, 941	
Bartlett <i>v.</i> Downes	183	—— <i>v.</i> Olivier 539, 563, 566	
—— <i>v.</i> Phillips	107	—— <i>v.</i> Salisbury (Marq.	
—— <i>v.</i> Vinor	248	of).....	51, 361
Barton <i>v.</i> Barton	973	Beavan <i>v.</i> Delahay	320
Barton's Will, <i>In re</i> Trusts of	892		
Barwick <i>v.</i> Matthews	148		

	PAGE		PAGE
Beaver v. Nowell....	661, 752, 865	Bermondsey (Vestry of) v.	
Bebb v. Penoyre	726	Brown	233
Beek v. Burn	851	Bernard, Ex parte ..	403, 415, 423
Beekton v. Barton	807	— v. Montague	847
Beckwith's Case	78, 342	Bernasconi v. Atkinson ..	939, 941
Bective (Countess of) v. Hodg-		Berrey v. Lindley	24, 29
son.....	473, 507	Berry and Riche's Case.....	371
Bedell's Case	751	— v. Berry	354, 936
Bedford (Duke of) v. Dawson .	229	— v. Briant	849
Bedinfield v. Canterbury (Arch-		— v. Goodman	8
bishop of)	262, 271	— v. White.....	371, 380
Beech v. St. Vincent (Lord) ..	515,	Bertie v. Falkland	927
	517	Best v. Drake	328
Beer v. Beer	306	Betnam v. Bateston	342
Beeston v. Weate 167, 193, 200,	218	Betty v. Elliott	54
Beggan v. McDonald	Add.	— v. Humphreys	55
Begley v. Cook	898	Bevan v. White	651
Bell v. Bell.....	477, 616, 753	Beverley v. Canterbury (The	
— v. Cade	492, 849	Archbishop of) ..	273
— v. Holtby	757	— v. Cornwall.....	273
— v. Midland Rail. Co. 171,	224	— (Mayor of) v. Att.-	
— v. Twentymen	218	Gen.	575
— v. Wilson	211	Beveston v. Hussey	723
Bellassis's Trusts, In re ..	681, 887	Beviss's Trusts, Re	914
Bellis's Trusts, In re	993, 996	Bewick v. Whitfield	111
Benest v. Pipon	183	Bibbens v. Potter	Add.
Benfieldside Local Board v.		Bibby v. Thompson	679
Consett Iron Co.....	210	Bibin v. Walker	662
Bengough v. Edridge 425, 433,	508	Bible v. Hussey	317
Bennet, Ex parte	982	Bickett v. Morris	193
— College v. London (Bp.		Bickford v. Chalker	844
of).....	567	Bickley v. Bickley	82, 83, 735
— v. Davis	60, 62	— v. Guest	388, 390
Bennett's Trust, Re.....	845, 851	Biddle v. Perkins	488
Bennett v. Bayes.....	321	Biddlecombe v. Bond	979
— v. Bennett	724, 867	Biddulph v. Lees ..	652, 653, 718
— v. Colley	91, 92	— v. St. George's	217
— v. Davis	927	Biederman v. Seymour	734
— v. Hayter	578	Bifield's Case	616, 753
— v. Honeywood	586	Bigg v. Bensley	862
— v. Lowe	654	Bignell v. Clarke	324
— v. Marshall	936, 937	Bignold v. Giles....	645, 727, 899
— v. Reeve	129	Billing v. East India Company	795
— v. Tankerville(Earl of)	606,	— v. Welch.....	972
	610	Billson v. Crofts	979
Bennison v. Cartwright.....	187	Binckes v. Pash	234
Benson v. Benson	985	Bindon (Lord) v. Suffolk (Earl	
— v. Chester ..	129, 130, 147	of)	800, 801, 898
— v. Scott	729	Bingham's Case	733
Bentinck v. Portland (Duke of)	476	Bingley v. Broadhead	491
Bentley v. Blizard	931	Binstead v. Buck	318
— v. Oldfield	724, 726	Birch, In re	97
Benyon v. Maddison	851	— v. Wright.....	16, 18, 20
Berkeley v. Swinburne ..	802, 843	Bird v. Christopher.....	388, 389

	PAGE		PAGE
Bird <i>v.</i> Higginson	171	Blundell <i>v.</i> Dunn	930
— <i>v.</i> Hunsdon	643	— <i>v.</i> Gladstone .. 935, 936,	941
— <i>v.</i> Maybury	849	— <i>v.</i> Stanley	961, 967
Birds <i>v.</i> Askey	847	Blunden <i>v.</i> Baugh	18
Birkett, In re	582	Blutchford <i>v.</i> Plymouth (Mayor	
Birley <i>v.</i> Birley	415	of)	170
Birmingham Canal Co. <i>v.</i> Dud-		Blyth <i>v.</i> Dennett	32
ley (Earl)	211	Board <i>v.</i> Board	60
— (Corp. of) <i>v.</i> Allen	207	Boddam, Ex parte	982
— &c., Gaslight Co.,		Boddington <i>v.</i> Abernethy	364
Ex parte, In re Fanshaw ..	326	— <i>v.</i> Robinson	346
— <i>v.</i> Kirwan	77	Boddy <i>v.</i> Dawes	852
Biscoe <i>v.</i> Perkins	602	Bodens <i>v.</i> Watson	862
Bishop <i>v.</i> Bishop	68, 82	Boehm <i>v.</i> Clarke	686
— <i>v.</i> Bryant	325	Boileau <i>v.</i> Rutlin	14
Biss <i>v.</i> Smith	686	Bolger <i>v.</i> Mackell	828, 845
Blackburn <i>v.</i> Stables	615, 624	Bolton <i>v.</i> Bolton .. 722, 723, 725,	846
Blacket <i>v.</i> Lamb .. 407, 413, 415,	493	Bond and Brown's Case ..	818, 819
Blackett <i>v.</i> Bradley	211	Bond's Case	818
Blackman, In re	936, 941	Bone <i>v.</i> Cook	907, 908
Blackwell <i>v.</i> Bull	641, 643	Bonfield <i>v.</i> Hassell	980
Blaggrave <i>v.</i> Blaggrave .. 355, 356,	357	Bonomi <i>v.</i> Backhouse	207
— <i>v.</i> Clem	744	Boodle <i>v.</i> Cambell	332
Blagrove <i>v.</i> Hancock .. 476, 477,	837	— <i>v.</i> Campbell	300
Blake's Trust, In re	643	Boon <i>v.</i> Cornforth	642
Blake <i>v.</i> Barnett	793	Booth <i>v.</i> Alcock	170, 173
— <i>v.</i> Blake	54	— <i>v.</i> Alington	897, 899
— <i>v.</i> Luxton	54	— <i>v.</i> Booth .. 823, 824, 825, 830,	
— <i>v.</i> Peters	742		848, 852
Blakemore's Settlement, In re	492	— <i>v.</i> Carter	555
Blamford <i>v.</i> Blamford	882	— <i>v.</i> Lambert ..	81
Blamire <i>v.</i> Geldart	851	— <i>v.</i> Lindsey	83
Blanchard <i>v.</i> Bridges	234	— <i>v.</i> Potter	277, 280
Blanchhall <i>v.</i> Gibson	54	— <i>v.</i> Vicars	888
Bland <i>v.</i> Bland	417	Boothby <i>v.</i> Vernon	60
— <i>v.</i> Inman	300	Booton <i>v.</i> Rochester (Bishop of)	273
— <i>v.</i> Williams .. 491, 839, 853		BORASTON'S CASE	809
Blandford <i>v.</i> Thackerell .. 446, 527,		— — — — — 638, 829, 832, 836,	
	559		837, 839, 849
Blandy <i>v.</i> Widmore	78	Boreham <i>v.</i> Bignall	476
Blann <i>v.</i> Bell	562	Boreston <i>v.</i> Adam	736
Blasson <i>v.</i> Blasson	511, 801	Boroughes's Case	298
Blatchford <i>v.</i> Cole	11	Bortoft <i>v.</i> Wadsworth	802
Blayney's Trust, Re	940	Borton <i>v.</i> Borton	973
Blease <i>v.</i> Burgh.	491, 509, 846	Boson <i>v.</i> Statham	532, 563
Blewett <i>v.</i> Jenkins	295	Bostock <i>v.</i> Blakeney	87
— <i>v.</i> Tregonning ..	137, 169	— <i>v.</i> Smith	81
Blinston <i>v.</i> Warburton ..	689, 721	Boswel's Case	259, 270, 271
Bliss <i>v.</i> Hall	168, 216	Boswell <i>v.</i> Dillon	493
Blitheman <i>v.</i> Blitheman	344	Bosworth <i>v.</i> Farrand	744
Blodwell <i>v.</i> Edwards	934	Boteler <i>v.</i> Allington	265
Blood <i>v.</i> Keller	172	Botheroyd <i>v.</i> Wooley	303
Bloomfield <i>v.</i> Johnston	133	Botting <i>v.</i> Martin	26
Blower's Trusts, In re	938	Botts <i>v.</i> Thompson	140, 143

	PAGE		PAGE
Boughton v. Boughton	849	Brandon v. Robinson ..	85, 975, 985
——— v. James ..	409, 492, 495, 506, 805, 845	Branstrom v. Wilkinson	852
——— v. Midland Great Western Railway Company	211	Bray v. Bree	486
Boulton v. Beard	854	——— v. Hammersley	486
——— v. Pilcher	849, 855	BRAYBROKE v. INSKIP	986
——— v. Reynolds	321	——— 885, 992, 997, 1000, 1004	
Bourke v. Bourke	28	Braythwayte v. Hitchcock	26
Bourne v. Buckton	512, 515, 516, 518	Brediman's Case	730
Bouverie, Re	742	Bree v. Perfect	854
Bovey v. Smith	422	Breedon v. Tugman	846, 851
Bowen v. Barlow	1009	Brenan v. Boyne	54
——— v. Scovcroft	675	Brett v. Rigden	595, 903, 905
Bower v. Hill	223	——— v. Sawbridge	867
Bowes, Ex parte	993	Brettell, Ex parte ..	987, 989, 991, 992
BOWLES'S (LEWIS) CASE	37	Brice v. Smith	719
——— 49, 59, 60, 86, 603, 714		Bricker v. Whatley	900, 901
——— v. Bury	37	Brickhead v. York (Archbishop of)	273
——— v. Stewart	88	Bridge v. Abbot	907, 913
Box v. Jubb	Add.	——— v. Yates	883, 889
Boyce v. Hanning	488	Bridger v. Ramsey	651
Boycott v. Cotton	856	Bridges v. Potts	25, 29
Boyd v. Petrie	384, 385, 390	——— v. Stephens	112
Boydell v. Golightly	492, 493, 651, 867	Brierley v. Kendall	15
——— v. Walthall	342	Briggs v. Oxford (Earl of)	113, 116, 488, 489, 491
Boyle v. Boyle	543	——— v. Sharp	262, 275
——— v. Tamlyn	162, 176, 217	——— v. Sowry	317
Bracebridge v. Cooke	892	Bright v. Rowe	911
Brackenbury v. Gibbons	363	——— v. Walker	181, 183, 188, 189
Bradbee v. Christ's Hospital..	217	Brigstocke v. Brigstocke	84
Bradburn v. Morris ..	205, 206, 222	Bringlee v. Goodson	379
Bradbury v. Wright	294, 297	Briscoe v. Drought	195, 199
Bradford v. Belfield	1005	——— v. Perkins	354
——— v. Brownjohn	95	Bristow v. Boothby ..	468, 470, 488
——— v. Foley	834	——— v. Bristow	535
Bradley v. Cartwright	622	——— v. Skirrow	265
——— v. Gill	171	——— v. Warde ..	403, 406, 410, 485, 494
——— v. Hughes	985	British Museum (The Trustees of the) v. White ..	539, 553, 568
BRADLEY v. PEIXOTO	968	Britton v. Twining	862
——— 716, 970, 971, 972		——— v. Wade	273
Bradshaw v. Bradshaw ..	923, 925, 940	——— v. Ward	270
——— v. Eyre	146	Broadbent v. Ramsbotham ..	195
——— v. Melling	617	——— v. Wilkes	137
——— v. Skilbeck	692	Broadhurst v. Morris	673, 675, 753
——— v. Tasker	542	Broadwood's Settled Estates, In re	759
Bradwin v. Harper	919	Brock and Harris's Case	159
Braithwaite v. Cooksey	320	Brocklebank v. Johnson ..	845, 854
Bramley v. Chesterton	34	Brockington v. Saunders	25
Brandon v. Aston	803, 980		
——— v. Brandon	955		

	PAGE		PAGE
Brodie v. Barry	67	Browne v. Amyot	306
— v. Chandos (The Duke of).....	523, 554	— v. Browne	94, 841
Bromehead v. Hunt	661	— v. Groombridge	808
Bromfield v. Kirber	132	— v. Hammond....	799, 835
— v. Crowder....	838, 839	— v. Hope	906
Bromitt v. Moore	727	— v. Jerves	718
Bromley v. Wright	845, 851	— v. Powell	321, 324
Brompton (Incumbent of), Ex parte.....	583	— v. Ramsden	354
Brook v. Archer	185	— v. Stoughton....	488, 506
— v. Badley	554, 559	— v. Warner.....	21, 23, 30
— v. Brook	728	Browning v. Dann.....	321, 322
Brooke, In re	993	Bruce v. Bainbridge	725
— v. Pearson	984	— v. Bruce	406
— v. Rogers	42	— v. Charlton	845
— v. Turner	494	— v. Deer (Presbytery of) ..	572
Brookesbie's Case	248	— v. Helliwell	152
Brookesby v. Wickham	244	Brudenell v. Elwes..	406, 410, 412
Brookman's Estate, In re	906		485, 486, 490, 495
Brookman v. Smith	601, 873	Brumfitt v. Rogers	168
Brooksby v. Watts	276	Brunsdon v. Woolledge	536
Broom v. Broom	887	Brunton v. Hall	205, 206
Broughton v. Langley ..	355, 606	Bryan v. Collins	508
— v. Randall	74	— v. Mansion	654
Brouncker v. Bagot	862	— v. Twigg	899
Brown's Case	740	— v. Whistler	168, 171
— (Lady) Case	165, 177, 166, 197	Bryant v. Lefever	Add.
— Settlement, In re..	393, 394	Bryden v. Willett	653
— Trusts, In re	405, 407, 413, 420, 931	Buccleuch (Duke of) v. Metropolitan Board of Works ..	195
Brown, In re	505	— v. Wakefield	151, 210
— and Sibley's Contract, In re	993, 996	Buchanan v. Andrew	210
— v. Arundell.....	315	— v. Harrison	737
— v. Best	220	Buck d. Whalley v. Nurton ..	935
— v. Candler	306	Buckby v. Coles	178
— v. Cutler	835	Buckeridge v. Ingram	68
— v. De Laet	645	Buckhurst Peerage	339, 345
— v. Glenn	321	Buckinghamshire v. Drury ..	76
— v. Hammond	916	— (Earl of) v. Hobart	953, 958
— v. Jarvis....	645, 835, 898	Buckle v. Bristowe	582
— v. Metropolitan Counties, &c., Society ..	20	Buckler v. Symons	344
— v. Nisbett	412	Buckley v. Howell	114
— v. Oakshot	821	— v. Kenyon	295
— v. Robins ..	207, 208, 236	— v. Taylor	319
— v. Selwyn	926	Buckmer's Case	683
— v. Shevill	315	Buckworth v. Thirkell ..	61, 71, 456
— v. Stead	963	Buffar v. Bradford..	673, 674, 676, 910
— v. Whiteway	357	Bulkeley v. Hope	952, 954, 961
— v. Windsor	214	Bull v. Comberbach	865
— v. Wooler	856	— v. Johus	851
		— v. Pritchard ..	476, 492, 840, 844

	PAGE
Bullard <i>v.</i> Harrison	168, 218
Bullock <i>v.</i> Dodds	787, 792, 793
—— <i>v.</i> Downes	897
—— <i>v.</i> Finch	82
—— <i>v.</i> Fladgate	422
—— <i>v.</i> Stones	301, 439
—— <i>v.</i> Thorne	379, 388
Bulwer <i>v.</i> Astley	99
—— <i>v.</i> Bulwer	22, 104
Bunbury <i>v.</i> Doran	728, 934
Bunting <i>v.</i> Marriott	555, 559, 583
Burden <i>v.</i> Burville	660
Burdus <i>v.</i> Dixon	1009
Burges <i>v.</i> Mawbey	98, 754, 906
Burgess <i>v.</i> Wheate	772, 774, 775, 778
Burk <i>v.</i> Brown	781
Burke <i>v.</i> Annis	722
Burleigh <i>v.</i> Pearson	417
Burley's Case	615, 752
Burley <i>v.</i> Evelyn	470
Burn <i>v.</i> Phelps	32
Burnaby <i>v.</i> Barsby	545
—— <i>v.</i> Griffin	658
Burnett <i>v.</i> Coby	609
Burney <i>v.</i> Macdonald	782
Burnham's National Schools, In re	586
Burnsall <i>v.</i> Davy	619
Buron <i>v.</i> Denman	30
Burrell <i>v.</i> Egremont (Lord) . .	953, 956, 958, 959, 960, 962
Burrough <i>v.</i> Taylor	298
Burrowes <i>v.</i> Grading	29
Burt <i>v.</i> Hellyar	888
—— <i>v.</i> Sturt	512, 516, 517, 518
Burton <i>v.</i> Brooks	12
—— <i>v.</i> Hastings	661
—— <i>v.</i> Powers	722
Burt's Estate, Re	1006
Bury <i>v.</i> Pope	181
Busby <i>v.</i> Greenslate	600
Bush <i>v.</i> Trowbridge Water- works Company	212, 229
Busk <i>v.</i> Aldam	421
Bustard's Case	83
Bustard <i>v.</i> Saunders	679, 887
Butcher <i>v.</i> Butcher	403
Bute (Marquis of) <i>v.</i> Harman	492
Butler's Will, In re	759
Butler <i>v.</i> Baker	69
—— <i>v.</i> Duckmanton	8, 9
—— <i>v.</i> Imperial Gas Co. . . .	204
—— <i>v.</i> Lowe	805, 807

	PAGE
Butler <i>v.</i> Monnings	331
Butt's Case	161, 313
Butter <i>v.</i> Ommaney	865
Butterfield <i>v.</i> Butterfield . .	650, 862
Buttery <i>v.</i> Robinson	293, 294
Buxton <i>v.</i> Monkhouse	294
Byam <i>v.</i> Sutton	961, 962
Byng <i>v.</i> Byng	676
Byrt <i>v.</i> Manning	280

C.

CADELL <i>v.</i> PALMER	424
—— ——— ——— ——— ——— ———	347, 403, 462, 505
Caffary <i>v.</i> Caffary	675
Calcraft <i>v.</i> Thompson	202
Caldecott <i>v.</i> Brown	87, 88
Caldwell <i>v.</i> Baylis	110
—— <i>v.</i> Fellowes	890
Caledonian Railway Company <i>v.</i> Belhaven (Lord)	211
—— ——— ——— <i>v.</i> Sprot	168,
180, 209, 211, 213, 214	
Caley's Case	709
Calthorpe <i>v.</i> Gough	874
Calvert <i>v.</i> Armitage	562
—— <i>v.</i> Kitchin	280
Calvin's Case	780, 781
Cambridge <i>v.</i> Rous	490
—— (The Chancellor of) <i>v.</i> Walgrave	262, 730
Camden (Marquis of) <i>v.</i> Batter- bury	26
Camoy's <i>v.</i> Blundell	935, 940, 941
Campbell's Case	311
Campbell <i>v.</i> Allgood	115
—— <i>v.</i> Bouskill	673, 752
—— <i>v.</i> Campbell	305, 877, 878
—— <i>v.</i> Harding	654, 693, 862
—— <i>v.</i> Leach	295, 416
—— <i>v.</i> Radnor (Lord)	566, 567
—— <i>v.</i> Sandys	54, 55
—— <i>v.</i> Wilson	181, 183
Cancellor <i>v.</i> Cancellor	615
Candy <i>v.</i> Campbell	654, 693
Canham <i>v.</i> Fisk	170, 174, 230
Cann <i>v.</i> Cann	55
Canning <i>v.</i> Canning	720, 726
Cannon <i>v.</i> Villars	224
Cantillons, Minors, In re . . .	848
Cantley, Re	996
Cape <i>v.</i> Cape	677
—— <i>v.</i> Scott	145
Capel <i>v.</i> Buzzard	318

	PAGE		PAGE
Capron <i>v.</i> Capron	310	Cavan (Lady) <i>v.</i> Pulteney	67
Carbery <i>v.</i> Cox.....	539, 542, 581	Cawood <i>v.</i> Thompson.....	555
Careless <i>v.</i> Careless..	919, 923, 935, 936, 937	Chadock <i>v.</i> Cowley.....	718
Carey <i>v.</i> Yeo	280	Chadwick <i>v.</i> Marsden	174, 221
Carlyon <i>v.</i> Lovering..	188, 189, 197, 211, 216	———— <i>v.</i> Trower	215
———— <i>v.</i> Truscott	354	Chaffers <i>v.</i> Abell.....	845, 846
Carne <i>v.</i> Long	495, 540	Challenger <i>v.</i> Shepherd ..	723, 725
Carpenter, In re	1002	Challenor's Case	158
———— <i>v.</i> Colins	20, 21	Challoner and Moore's Case ..	157
———— <i>v.</i> Dunsmure	51	Challoner <i>v.</i> Murhall	55
Carr <i>v.</i> Atkinson.....	408	Chamberlain, In re	97
—— <i>v.</i> Erroll (Earl of).....	470	———— <i>v.</i> Agar	928
—— <i>v.</i> Lambert.....	147, 148	Chamberlayne <i>v.</i> Brockett	555, 576, 581
—— <i>v.</i> Foster.....	186, 187, 190	———— <i>v.</i> Chamberlayne	623, 752
Carruthers <i>v.</i> Carruthers	77	Chamberlyne <i>v.</i> Dummer	115
Carstairs <i>v.</i> Taylor	198	Chambers, In re.....	389
Carte <i>v.</i> Carte	974	———— <i>v.</i> Atkins	679
Carter <i>v.</i> Barnardiston	360	———— <i>v.</i> Taylor	717
———— <i>v.</i> Bentall....	617, 651, 689	Champion <i>v.</i> Smith.....	535
———— <i>v.</i> Bletsoe.....	856	Chance <i>v.</i> Chance	851
———— <i>v.</i> Carter	300, 978	Chancellor's (Lord) Case	261, 262
———— <i>v.</i> Copley	265	Chandler <i>v.</i> Howell.....	559, 561
———— <i>v.</i> Green	558, 564, 566	———— <i>v.</i> Thompson ..	201, 234
———— <i>v.</i> Sebright	96	Chandless <i>v.</i> Price	650, 862
Cartwright <i>v.</i> Smith	323	Chandos (Duke of) <i>v.</i> Talbot	856, 859, 953, 955
———— <i>v.</i> Vaudrey	928	Chaplin's Trusts, Re	910
Carver <i>v.</i> Bowles....	407, 413, 492	Chaplin <i>v.</i> Chaplin ..	297, 365, 754
———— <i>v.</i> Burgess	800	Chapman's Case	720
Cary <i>v.</i> Abbot.....	541, 543	Chapman <i>v.</i> Blissett.....	473, 803
Casamajor <i>v.</i> Strode	147	———— <i>v.</i> Brown..	493, 555, 559, 565, 581, 582
Casberd <i>v.</i> Attorney-General..	789	———— <i>v.</i> Chapman	908
Casborne <i>v.</i> Scarfe....	61, 64, 365, 744, 991, 992, 1009	———— <i>v.</i> Gatcombe	967
Casburne <i>v.</i> Inglis	64	———— <i>v.</i> Towner.....	24, 29
Case <i>v.</i> Drosier	470, 488	Chappell's Trust, Re	870
Casey's Trusts, In re	982	Charitable Donations (Commis- sioners of) <i>v.</i> Sullivan	572
Casey <i>v.</i> Lalor.....	726	———— <i>v.</i> Walsh..	542
Castle <i>v.</i> Fox	800	Charitable Gifts for Prisoners, In re; Ex parte Governors of Christ's Hospital	587
Castledon <i>v.</i> Turner	938	Charnocke <i>v.</i> Warsley	66
Castlemaine (Lord) <i>v.</i> Craven (Lord)	110	Charter <i>v.</i> Charter ..	937, 939, 940
Catesby <i>v.</i> Peterborough (Bp. of)	271	Chasemore <i>v.</i> Richards ..	196, 197
Catley <i>v.</i> Sampson	777	Chatfield <i>v.</i> Berchtoldt ..	50, 53, 57
Cator <i>v.</i> Cator	679	Chatham (Earl of) <i>v.</i> Tothill..	862
—— <i>v.</i> Lewisham Board of Works	217	Chatteris <i>v.</i> Young.....	909
Cattley <i>v.</i> Arnold	306	Chauncy's Case	46
Cattlin <i>v.</i> Brown	466, 476	Chauncy <i>v.</i> Graydon.....	728, 729
Caulfield <i>v.</i> Maguire	102, 419, 862, 978	Cheeseman <i>v.</i> Partridge.....	576
Cautley, In re	994		

	PAGE
Cheesman <i>v.</i> Hardham ..	129, 133
Chelley <i>v.</i> Martin	834
Cheney's (Lord) Case.....	936
Cherrington <i>v.</i> Abney.....	234
Cherry <i>v.</i> Boulthbee.....	380
—— <i>v.</i> Mott.....	562, 581
Chesshyre <i>v.</i> Biss	964
Chester <i>v.</i> Chadwick	409
—— <i>v.</i> Chester	559, 569
—— <i>v.</i> Willan	890
—— <i>v.</i> Willes.....	953, 955
Chetham <i>v.</i> Williamson.....	297
Chevaux <i>v.</i> Aislable	851
Cheyney's Case	919, 923, 927
Chichester (Lord) <i>v.</i> Hall	333
—— <i>v.</i> Oxendon.....	724
Child <i>v.</i> Bailie.....	436
—— <i>v.</i> Stenning	230
Chilton <i>v.</i> London (Corp. of) ..	135
Chinnery's Estate, In re	<i>Add.</i>
Chirton's Case	767, 769
Choach Choon Nioh <i>v.</i> Spottis-	
woode	566
Cholmeley <i>v.</i> Paxton	113
Cholmondely <i>v.</i> Clinton	733
Chowne <i>v.</i> Baylis	793
Christ's College, Cambridge,	
Case of	536
Christ's Hospital <i>v.</i> Granger..	495
—— <i>v.</i> The Gover-	
nors of, Re	545
Christie <i>v.</i> Gosling	483
—— <i>v.</i> Ovington	1011
Chudleigh's Case 40, 336, 337, 338,	
340, 345, 347, 373, 713, 765, 767	
Church's (T.) Will, Re	793
Church Building Society (In-	
corporated) <i>v.</i> Barlow	558
—— <i>v.</i> Coles	570
Church Estate Charity, Wands-	
worth, In re.....	583
Church <i>v.</i> Dalton	12
—— <i>v.</i> Kemble	493
—— <i>v.</i> Wyat	751
Churchill <i>v.</i> Churchill....	407, 414
—— <i>v.</i> Marks	972, 980
Churchman <i>v.</i> Harvey....	420, 421
Circuitt <i>v.</i> Pery	664
City of London Brewery Co. <i>v.</i>	
Tennant 201, 202, 225, 226, 227,	
228	
Clache's Case	638, 658, 659
Clancy, Re	556, 558
Clancy <i>v.</i> Byrne	176

	PAGE
Clarendon (Earl of) <i>v.</i> Barham	952, 961, 963
Clark and Lamb's Case.....	164
Clark In re....	658, 659, 660, 661
—— <i>v.</i> Cogge.....	178, 180
—— <i>v.</i> Gaskarth	314
—— <i>v.</i> London School Board	229
—— <i>v.</i> Ross	858
—— <i>v.</i> Taylor	581
Clark's Estate, Re	468
—— Trusts, In re.....	496, 540, 582
Clarke <i>v.</i> Abbott.....	1009
—— <i>v.</i> Blako	801
—— <i>v.</i> Butler	834
—— <i>v.</i> Chambers	982
—— <i>v.</i> Clark....	202, 203, 225,
	226, 807
—— <i>v.</i> Clemmans	905, 912
—— <i>v.</i> Franklin.....	75, 79
—— <i>v.</i> Philips	387
—— <i>v.</i> Phillips	910, 912
—— <i>v.</i> Tinker.....	132
Clarkson <i>v.</i> Scarborough	302
—— <i>v.</i> Woodhouse	131
Clavering's Case.....	171
Clavering <i>v.</i> Clavering ..	108, 109
Claxton <i>v.</i> Claxton	193
Clay <i>v.</i> Pennington	865
—— <i>v.</i> Thackray	187
Clayton <i>v.</i> Blakey	24
—— <i>v.</i> Corby....	136, 137, 190
—— <i>v.</i> Gregson	934
—— <i>v.</i> Illingworth	27
—— <i>v.</i> Nugent (Lord) ..	934, 942
Cleary's Trusts.....	616, 753, 862
Clegg <i>v.</i> Fishwick	93
Clement <i>v.</i> Scudamore	740
Clephane <i>v.</i> Lord Provost, &c.,	
of Edinburgh	580
CLERE <i>v.</i> CORBET	117
Clergy Society, In re.....	581, 583, 941
—— (Sons of the), Corpora-	
tion of, <i>v.</i> Mose	585
Clerk <i>v.</i> Clerk	885
—— <i>v.</i> Day	622
Clifford <i>v.</i> Brooke	473
—— <i>v.</i> Clifford	957, 960
—— <i>v.</i> Hoare	224
Clifton <i>v.</i> Goodbun.....	930
Cline's Estate, In re	310
Clobberie's Case	821, 823, 848
Cloberry <i>v.</i> Lampen	821
Clogstoun <i>v.</i> Walcott	418, 421
Closse <i>v.</i> Pomcoyes.....	246

	PAGE		PAGE
Clossey, Re	58	Collison's Case	539
Clowes v. Hughes	16	Collyer v. Burnett	585
—— v. Staffordshire Pot- teries Waterworks Co.	228	Colmore v. Tyndall	361
Cluff v. Cluff	560	Colson v. Colson	614
Clun v. Archer	284	Colt and Glover v. Coventry (Bishop of) 82, 261, 269, 271, 272	
CLUN'S (WILLIAM) CASE	284	Colthirst and Bejushin's Case.	811
——	103, 291	Coltsmann v. Coltsmann	689, 719, 724, 726
Clulow's Estates, In re	306, 512, 517	Combe v. Hughes	679
Coal Consumers' Association, In re	327	Comber v. Hill	659
Coape v. Arnold	601, 604	Comfort v. Brown	Add.
Coates v. Hart	661	Commissioners of Sewers v. Glasse	132, 137, 141
Cobb v. Stokes	11	Commons v. Marshall	416
Cock v. Cock	643	Comport v. Austen	476, 492, 842
Cocker v. Cowper	171	Compton (Lord) v. Oxenden	949, 950, 952, 953
Cockerell v. Cholmeley	113	—— v. Richards	173
Cocks v. Manners	539, 540	Conduitt v. Soane	804
Cockshott v. Cockshott	641	Connmee v. Taaffe	899
Codling v. Johnson	181	Connolly v. Connolly	890
Coe's Trust, Re	977	Connor, In re	931, 934
Coffin v. Coffin	115	Consett v. Bell	111
—— v. Cooper	390, 419	Constable v. Nicholson	137
Cogan v. Cogan	347	Conway's (Sir John) Case	133
—— v. Stephens	565	Coo v. Cauthorn	139
Cohen v. Waley	661	Cook's (Sir Edward) Case	769
Coke's (Lord) Case	636	Cook v. Cook	157, 887
Colbron v. Travers	299	—— v. Duckenfield	573
Colchester v. Law	784	—— v. Gerrard	642
—— v. Roberts	221, 222	—— v. Guerra	17
Colclough v. Colclough	613, 619, 622, 726	—— v. Jaggard	726
Coldwell v. Holme	578, 583	Cooke, Ex parte	984
Cole v. Goble	686, 862	—— v. Blake	358, 359
—— v. Levingston	656, 658	—— v. Bowen	803
—— v. Scott	800	—— v. Bowler	473
—— v. Sewell	385, 470, 471, 472, 473, 474, 488	—— v. Bromehill	376
Colebeck and Jarrom, In re ..	914	—— v. Cholmondeley	101, 274, 275
—— v. Girdlers' Co.	217	—— v. Crawford	1002, 1003, 1005, 1006, 1008
Colefatt v. Newcomb	259	—— v. Cunliffe	388
Colegrave v. Manby	91	—— v. Loxley	276
Coleman v. Foster	171	—— v. Turner	974
Coles v. Witt	616	—— v. Whalley	115
Collard v. Roe	75	Cookson v. Bingham	724, 889, 899
Colley's Trusts, Re	912	Cooling and the Great Northern Railway Company, Re	229
Collier v. King	12	Coombe v. Hughes	513
—— v. McBean	358, 601, 602	Cooper v. Cartwright	964
—— v. Walters	356, 357, 358, 601	—— v. Cooper	855
Collingwood v. Pace	735, 736, 781	—— v. Forbes	801
Collins v. Harding	310	—— v. France	732
—— v. Johnson	907		
—— v. Plummer	463		
Collinson v. Pater	560		

	PAGE		PAGE
Cooper v. Hubbuck	189, 235	Cowx v. Foster	418, 421, 422
— v. Kynock	361, 601, 602	Cox, In re	555, 559
— v. Macdonald	62	— v. Bent	24
— v. Marshall	144, 145, 146	— v. Bockett	982
— v. Pitcher	655	— v. Cox	422
— v. Wyatt	980	— v. Davie	555, 559
Coote v. Bath (Mayor of)	232	— v. Fonblanque	981
— v. O'Reilly	99	— v. Matthews	173, 192
Cope v. Henshaw	942	— v. Parker	355, 775, 873
Copinger v. Crehane	573, 585	— v. Quantock	887
Copley v. Enright	105	Coxhead's Case	754
Coppin v. Coppin	906	Cradock v. Cradock	651, 888
— v. Fernyhough	93	— v. Owen	775, 784
Coppinger v. Gubbins	109	Crafton v. Frith	538, 556
CORBET'S (SIR MILES) CASE	117	Cramer v. Mott	314, 322
— 133, 463, 639, 972		Cramp v. Playfoot	553, 556, 559, 564, 582
Corbet v. Corbet	76	Cranley v. Dixon	643
Corbett v. Hill	201	Cranswick v. Pearson	898, 899
CORBYN v. FRENCH	519	Craven v. Brady	408, 980
— 466, 554, 908		Crawford v. Trotter	678, 862
Cordall's Case	360	Crawley's Case	51, 343
Corker v. Ennys	382	Crawley v. Crawley	509, 512
Corlass, In re	801	— v. Price	25
Cormack v. Copous	651, 654, 678	Cray v. Willis	878, 879
Cornish v. Stubbs	27	Creagh v. Blood	42
Cornwallis's (Lord) Case	790	Creaton v. Creaton	354, 355, 357
Corr v. Corr	848, 849	Cresswell v. Cheslyn	910, 914
Corrigan v. Woods	14	— v. Cresswell	554
Cort v. Winder	801, 804	Crips v. Grysil	997
Cosen's Case	648, 649	Crockett v. Crockett	681
Costard and Wingfield's Case	134	Croft v. Evetts	541, 543
Cotching v. Bassett	172	Crofton v. Bunbury	900
Cotterell v. Griffiths	225	Crofts v. Haldane	229
Cotton v. Cotton	907	— v. Middleton	601
Coulson v. Coulson	606	Croker v. Brady	Ad.
Coulthirst v. Carter	834	Crompe v. Barrow	406, 411, 485, 490
Counden and Clerk's Case	733	Crompton v. Lea	198
— v. Clarke	919, 923	Cromwell's (Lord) Case	47
— v. Clerke	720, 721	Cromwell (Lord) v. Andrews	286
Courtauld v. Legh	186, 202	Crook v. Hill	931
Courtier v. Oram	492, 493	— v. Whiteley	930
Consens v. Rose	205	Crooke v. De Vandes	440, 442, 686, 887
Cousins v. Schroder	851	Cropton v. Davies	646
Couts v. Gorham	173	Crosier v. Tomkinson	315
Coventry v. Coventry	492, 517, 576, 804	Cross v. Hudson	392
Cowgill v. Oxmantown (Lord)	382	— v. Lewis	182
Cowlan v. Slack	130	Crossley v. Lightowler	192, 198, 216, 231
Cowley (Earl) v. Wellesley	108	Crowder v. Clowes	645, 646
Cowling v. Higginson	205, 206, 221	— v. Stone	689, 911, 926
Cowper v. Andrews	134	Crozier v. Crozier	404, 405, 408, 421, 422, 600, 622, 693, 721
— v. Cowper	735		
— v. Fletcher	297, 890		
— v. Mantell	909		

	PAGE		PAGE
Crump <i>v.</i> Wooley	70	Daly <i>v.</i> Beckett	295
— <i>d.</i> Woolley <i>v.</i> Norwood	613, 741	Dalzell <i>v.</i> Welch	617
Cruse <i>v.</i> Barley	845	Dancer <i>v.</i> Hastings	16, 321
— <i>v.</i> Howell	800, 913	Dand <i>v.</i> Kingscote	177, 220, 221
Cubitt <i>v.</i> Porter	217	Daniel <i>v.</i> Arkwright	412, 413
Cuckfield Burial Board, In re	756	— <i>v.</i> Anderson	175
Cudlip <i>v.</i> Rundall	12	— <i>v.</i> North	181, 182, 185
Culcraft <i>v.</i> Thompson	225	— <i>v.</i> Stepney	313
Cullen <i>v.</i> Commissioners of Charitable Donations and Bequests	588	— <i>v.</i> Ubley	971
Culley <i>v.</i> Doe <i>d.</i> Taylerson ..	63	— <i>v.</i> Warren	686
Culsha <i>v.</i> Cheese	909	Darby <i>v.</i> Darby	19
Culvert <i>v.</i> Joliffe	317	— <i>v.</i> Harris	314
Cumber <i>v.</i> Chichester (Bishop of)	272, 273	Darcy (Lord) <i>v.</i> Askwith	177
Cumming <i>v.</i> Bedborough	299	— <i>v.</i> Blake	69, 71
— <i>v.</i> Forrester ..	794, 795	Dare <i>v.</i> Heathcote	206
Cunliffe <i>v.</i> Brancker ..	356, 357, 362	Darley <i>v.</i> Martin	664, 690
Cunningham <i>v.</i> Moody	61, 70	Darling <i>v.</i> Clew	190
— <i>v.</i> Murray	678	Darrel <i>v.</i> Molesworth	873
Cunninghame <i>v.</i> Anstruther ..	413	Dashwood <i>v.</i> Peyton	641, 665
— <i>v.</i> Thurlow	391	Davall <i>v.</i> New River Company ..	775
Cunynghame's Settlement, In re	487, 493	Davenport's Trust, Re ..	928, 931
Cupit <i>v.</i> Jackson	328	Davenport <i>v.</i> Coltman	642
Curling <i>v.</i> Austin	178	— <i>v.</i> Oldis	660
— <i>v.</i> Shuttleworth	385	Davidson <i>v.</i> Chalmers	974
Currie <i>v.</i> Pye	559	— <i>v.</i> Dallas	802
Curriers' Company <i>v.</i> Corbett ..	174, 205, 226, 227	— <i>v.</i> Proctor	693, 851
Cursham <i>v.</i> Newland	617	Davie <i>v.</i> Stevens	673, 753
Curtis <i>v.</i> Curtis	84	Davies, Ex parte	689
— <i>v.</i> Graham	678	— <i>v.</i> Bush	382
— <i>v.</i> Hutton ..	529, 553, 566, 568	— <i>v.</i> Fisher	850, 852
— <i>v.</i> Lukin	465, 506	— <i>v.</i> Fitton	299
— <i>v.</i> Price ..	361, 602, 603, 604	— <i>v.</i> Hopkins	554
Cust <i>v.</i> Middleton	274	— <i>v.</i> Huguenin	390, 858
Cutting <i>v.</i> Derby	11, 29, 298	— <i>v.</i> Lowndes	737
		— <i>v.</i> Marshall ..	230, 234, 235
		— <i>v.</i> Powell	318
		— <i>v.</i> Sear	171, 178
		— <i>v.</i> Stephens	182
		— <i>v.</i> Wescomb	112
		— <i>v.</i> Williams ..	145, 187, 189, 224
		Davis <i>v.</i> Barrett	961, 963
		— <i>v.</i> Bennet	896
		— <i>v.</i> Bennett	896
		— <i>v.</i> Dysart (Earl of)	90
		— <i>v.</i> Elmes	905
		— <i>v.</i> Gyde	300
		— <i>v.</i> Kemp	910
		— <i>v.</i> Kirk	734
		— <i>v.</i> Williams	920
		Davison <i>v.</i> Gent	28
		Davy, Re	927
		Dawes' Trusts, In re	803
		— <i>v.</i> Hawkins	233

D.

D'Abbadie <i>v.</i> Bizoin	421
Dacke's (Sir J.) Case	791
Da Costa <i>v.</i> De Pas ..	541, 543, 577
Dacre <i>v.</i> Patrickson	784
Daintry <i>v.</i> Daintry	649, 686
Dale's (Utty) Case	50
Dalton <i>v.</i> Whitem	314
Daly <i>v.</i> Aldworth	889, 898

	PAGE		PAGE
Dawkins <i>v.</i> Penrhyn (Lord) ..	972	Destouches <i>v.</i> Walker	688
Dawney <i>v.</i> Dee	168	Deux <i>v.</i> Jeffreyes	331
Dawson <i>v.</i> Bourne	679	Devall <i>v.</i> Dickens	601
—— <i>v.</i> Killet	858	Devenish <i>v.</i> Baines	928
—— <i>v.</i> Small	582, 656, 694	Devery <i>v.</i> Grand Canal Co ..	194
Day and Drake's Case	166	Devisme <i>v.</i> Mello	799, 801
Day <i>v.</i> Day	21, 645, 975	Devonshire (Duke of) <i>v.</i> Caven-	
—— <i>v.</i> Spooner	130	dish (Lord G.)	485
—— <i>v.</i> Trig	919	—— <i>v.</i> Eglin	171
De Beauvoir <i>v.</i> Owen	333	Dewell, Re, Edgar <i>v.</i> Reynolds	785
De Garcin <i>v.</i> Lawson	541, 543	Dibble <i>v.</i> Bowater	299
De Grey <i>v.</i> Richardson	64	Dick <i>v.</i> Lacy	865
De Nicholls <i>v.</i> Saunders	17	Dicken <i>v.</i> Clarke	834, 916
De Serre <i>v.</i> Clarke	382	Dickin <i>v.</i> Hamer	68, 82
De Tastet <i>v.</i> Le Tavernier	979	Dickinson <i>v.</i> Grand Junction	
De Themmines <i>v.</i> De Bonneval	541,	Railway Co.	196, 197
	543, 566	—— <i>v.</i> Harbottle	202
De Witte <i>v.</i> De Witte	678, 679	—— <i>v.</i> Mort	413, 418, 422
Deerhurst (Lord) <i>v.</i> St. Alban's		Digges's Case ..	369, 370, 373, 377,
(Duke of)	478		388, 389
Defflis <i>v.</i> Goldschmidt	807	Dilley <i>v.</i> Matthews	931
Delacherois <i>v.</i> Delacherois	257, 778	Dillon <i>v.</i> Dillon	418
Delmare <i>v.</i> Robello	928	—— <i>v.</i> Freine	336
Delmege <i>v.</i> Mullins	25	—— <i>v.</i> Parker	77
Den <i>d.</i> Briddon <i>v.</i> Page	651	—— <i>v.</i> Reilly	539, 542
—— <i>d.</i> Franklin <i>v.</i> Trout	641	Dillwyn <i>v.</i> Llewellyn	718
Denby <i>v.</i> Moore	Add.	Dimes <i>v.</i> Grand Junction Rail-	
Denn <i>d.</i> Brune <i>v.</i> Rawlins	24	way Company	995, 1000
—— <i>d.</i> Gaskin <i>v.</i> Gaskin	720, 725	Dimmock's Case	369
—— <i>v.</i> Gaskin	896	Dimond <i>v.</i> Bostock	913
—— <i>d.</i> Geering <i>v.</i> Shenton	609, 752	Dinsdale <i>v.</i> Iles	18, 19
—— <i>d.</i> Goodwin <i>v.</i> Spray	741	Dixon's Trusts, In re	615
—— <i>v.</i> Mellor	722	Dixon <i>v.</i> Harrison	330
—— <i>d.</i> Moor <i>v.</i> Mellor	720, 726	—— <i>v.</i> Peacock	87, 98
—— <i>d.</i> Radclyffe <i>v.</i> Bagshaw ..	833	—— <i>v.</i> Rowan	956
—— <i>d.</i> Richardson <i>v.</i> Hood ..	724	—— <i>v.</i> Saville	71
—— <i>v.</i> Satterthwaite	837	Dobitofte <i>v.</i> Curteen	296
—— <i>v.</i> Shenton	686	Dobson <i>v.</i> Dobson	84
—— <i>v.</i> Slater	719, 722	—— <i>v.</i> Jones	14
—— <i>d.</i> Warren <i>v.</i> Fearnside	13, 20	Dodd <i>v.</i> Burchell	175
—— <i>d.</i> Webb <i>v.</i> Puckey	606, 618	—— <i>v.</i> Holme	213, 214
Denne <i>v.</i> Light	178	—— <i>v.</i> Wake	492
Dennehy's Estate, In re ..	410, 415	Dodds <i>v.</i> Dodds	613, 619, 864
Dennett <i>v.</i> Pass	331	—— <i>v.</i> Thompson	312
Denning <i>v.</i> Ellerton	403	Dodgson, In re	847
Dennis <i>v.</i> Frend	492	Dodson <i>v.</i> Hay	61, 491
Dent <i>v.</i> Allcroft	555, 557	Doe <i>d.</i> Allen <i>v.</i> Allen	936
—— <i>v.</i> Auction Mart Co.	202, 203,	—— <i>d.</i> Allport <i>v.</i> Bacon	725
	205, 225	—— <i>d.</i> Annandale <i>v.</i> Brazier ..	642
—— <i>v.</i> Dent	87	—— <i>d.</i> Armstrong <i>v.</i> Wilkin-	
—— <i>v.</i> Pepys	926	son	31
Denton <i>v.</i> Denton	116	—— <i>d.</i> Ashby <i>v.</i> Baines	727
—— <i>v.</i> Manners (Lord		—— <i>d.</i> Ashforth <i>v.</i> Bower ..	929
George)	558	—— <i>d.</i> Aslin <i>v.</i> Summersett ..	29

	PAGE		PAGE
Doe <i>d. Atkinson v. Fawcett</i> ..	726	Doe <i>d. Comberbach v. Perryn</i>	651
— <i>d. Atkinson v. Feather-</i>		— <i>d. Compere v. Hicks</i>	361
— <i>stone</i>	610	— <i>d. Cooke v. Danvers</i>	936
— <i>d. Baddeley v. Massey</i> ..	150	— <i>d. Cooper v. Collis</i> ..	618, 619
— <i>d. Bailey v. Foster</i>	29, 30	— <i>d. Cox v. —</i>	31
— <i>d. Barber v. Lawrence</i> ..	297	— <i>d. Crisp v. Barber</i>	10
— <i>d. Barnfield v. Wetton</i> ..	687	— <i>d. Crosthwaite v. Dixon</i> ..	881
— <i>d. Bastow v. Cox</i> 12, 15, 18, 26		— <i>d. Dacre (Lady) v. Roper</i>	725
— <i>d. Bates v. Clayton</i>	725	— <i>d. Davenish v. Moffatt</i> ..	29
— <i>d. Beach v. Jersey (Earlof)</i>	929	— <i>d. David v. Williams</i> ..	33, 320
— <i>d. Bean v. Halley</i> ..	648, 653	— <i>d. Davies v. Thomas</i> ..	16, 19
— <i>d. Bennett v. Long</i>	33	— <i>d. Davy v. Burasall</i>	680
— <i>d. Bennett v. Turner</i> ..	8, 19	— <i>d. Digby v. Steel</i>	33
— <i>d. Bills v. Hopkinson</i> ..	841	— <i>d. Dixie v. Davies</i> ..	12, 15, 19,
— <i>d. Birtwhistle v. Vardill</i> ..	736		26
— <i>d. Blackburn v. Blackburn</i>	732	— <i>d. Dolley v. Ward</i> ..	491, 838
— <i>d. Blake v. Luxton</i>	55	— <i>d. Douglas v. Lock</i> ..	170, 295
— <i>d. Blakiston v. Haslewood</i>	667	— <i>d. Driver v. Bowling</i> ..	641, 642
— <i>d. Blandford v. Applin</i>	618, 619	— <i>d. Dunraven v. Williams</i>	150
— <i>d. Blesard v. Simpson</i> ..	727	— <i>d. Durore v. Jones</i>	781
— <i>d. Blomfield v. Eyre</i>	412	— <i>d. Edney v. Benham</i>	295
— <i>d. Booley v. Roberts</i>	726	— <i>d. Edney Billet</i>	295
— <i>d. Booth v. Field</i> ..	353, 355	— <i>d. Ellis v. Ellis</i>	467
— <i>d. Borwell v. Abey</i>	898	— <i>d. Elton v. Stenlake</i>	495
— <i>d. Bosnall v. Harvey</i> ..	610,	— <i>d. Fisher v. Giles</i>	15
	612, 613	— <i>d. Fonnereau v. Fonne-</i>	
— <i>d. Bowman v. Lewis</i> ..	15, 17	— <i>reau</i>	601
— <i>d. Bradford v. Watkins</i> ..	32	— <i>d. Foster v. Scott</i>	56
— <i>d. Brammall v. Collinge</i> ..	260	— <i>d. Fyldes</i>	717
— <i>d. Brodbelt v. Thompson</i> ..	723	— <i>d. Gains v. Rouse</i>	936
— <i>d. Browne v. Greening</i> ..	929	— <i>d. Gallini v. Gallini</i> ..	618, 653,
— <i>d. Burden v. Burville</i>	657, 658		654
— <i>d. Burdett v. Wright</i> ..	564, 722	— <i>d. Garrod v. Garrod</i>	616
— <i>d. Burren v. Charlton</i> ..	616, 753	— <i>d. Garrod v. Olley</i>	15
— <i>d. Burton v. White</i> ..	719, 725	— <i>d. Gigg v. Bradley</i> ..	673, 676
— <i>d. Cadogan v. Ewart</i> ..	354, 356,	— <i>d. Gilman v. Elvey</i> ..	680, 753
	464, 686, 837	— <i>d. Gill v. Pearson</i>	971
— <i>d. Calvert v. Frowd</i>	33	— <i>d. Gillard v. Gillard</i>	351
— <i>d. Candler v. Smith</i> ..	610, 618	— <i>d. Goody v. Carter</i> ..	8, 10, 18, 19
— <i>d. Cannon v. Rucastle</i> ..	619, 723	— <i>d. Gord v. Needs</i> ..	920, 923,
— <i>d. Cape v. Walker</i> ..	648, 688		936, 937
— <i>d. Carlisle (Lord) v. Wood-</i>		— <i>d. Gorges v. Webb</i> ..	657, 660
— <i>man</i>	32	— <i>d. Graham v. Hawkins</i> ..	549
— <i>d. Chevalier v. Huthwaite</i>	940	— <i>d. Gray v. Stanion</i>	12
— <i>d. Chichester v. Oxenden</i> ..	929	— <i>d. Green v. Baker</i>	28, 32
— <i>d. Chidgey v. Harris</i>	564	— <i>d. Griffiths v. Lloyd</i>	332
— <i>d. Child v. Wright</i>	720	— <i>d. Grubb v. Grubb</i>	33
— <i>d. Clarke v. Clarke</i> ..	722, 725	— <i>d. Hallen v. Ironmonger</i>	358,
— <i>d. Clements v. Collins</i> ..	935		613
— <i>d. Clift v. Birkhead</i>	656	— <i>d. Harris v. Taylor</i>	652
— <i>d. Cock v. Cooper</i> ..	619, 689	— <i>d. Harrison v. Murrell</i> ..	10
— <i>d. Colclough v. Mulliner</i> ..	150	— <i>d. Harrop v. Green</i>	28
— <i>d. Cole v. Goldsmith</i>	610	— <i>d. Hatch v. Bluck</i>	469
— <i>d. Collier v. Terry</i>	353	— <i>d. Hayne v. Redfern</i> ..	779, 794

	PAGE		PAGE
Doe <i>d. Hayter v. Joinville</i> ..	937	Doe <i>d. Matthews v. Jackson</i> ..	31
— <i>d. Higgs v. Terry</i>	30	— <i>d. Morgan v. Morgan</i> ..	920,
— <i>d. Hindmarch v. Oliver</i> ..	19	923, 935, 936, 938	
DOE <i>d. HISCOCKS v. HISCOCKS</i>	918	— <i>d. Morris v. Underdown</i> .	837
—	925	— <i>d. Müller v. Claridge</i> ..	354
— <i>d. Hobbs v. Cockell</i>	30	— <i>d. Neville v. Rivers</i>	70
— <i>d. Hollingsworth v. Sten-</i>		— <i>d. Nicholl v. McKaeg</i> ..	12, 21
— <i>nett</i>	12	— <i>d. Noble v. Bolton</i> ..	354, 355,
— <i>d. Holt v. Horrocks</i>	63	356	
— <i>d. Howson v. Waterton</i> 544, 545		— <i>d. Oldershaw v. Breach</i> ..	25
— <i>d. Hughes v. Bucknell</i> ..	29	— <i>d. Oxenden v. Chichester</i>	920
— <i>d. Hull v. Wood</i>	26	— <i>d. Parker v. Boulton</i> ..	12, 29
— <i>d. Hunt v. Moore</i>	838	— <i>d. Parsley v. Day</i>	15
— <i>d. Jacobs v. Phillips</i> ..	17, 20	— <i>d. Patrick v. Beaufort</i>	
— <i>d. James v. Hallett</i> ..	604, 808	(Duke of)	8
— <i>d. Jearrard v. Bannister</i>	616,	— <i>d. Payne v. P'lyer</i>	724
718		— <i>d. Pennington v. Taniere</i>	25
— <i>d. Jeff v. Robinson</i>	52	— <i>d. Phillips v. Aldridge</i> ..	537
— <i>d. Jeffereys v. Hicks</i>	790	— <i>d. Phipps v. Mulgrave</i>	
— <i>d. Jesson v. Wright</i>	608	(Lord)	651
— <i>d. Johnson v. Johnson</i> ..	687	— <i>d. Planner v. Scudamore</i>	839
— <i>d. Jones v. Davies</i>	616	— <i>d. Player v. Nicholls</i> 356, 358	
— <i>d. Jones v. Jones</i>	69	— <i>d. Pottow v. Fricher</i>	724
— <i>d. Jones v. Owens</i> ..	686, 688	— <i>d. Preece v. Howells</i> 545, 548	
— <i>d. Keen v. Walbank</i>	356	— <i>d. Pree dy v. Holton</i> 929, 935	
— <i>d. Kimber v. Cafe</i> ..	357, 724	— <i>d. Priece v. Price</i>	18
— <i>d. Kindersley v. Hughes</i>	29	— <i>d. Prior v. Ongley</i>	24
— <i>d. King v. Frost</i> ..	688, 689,	— <i>d. Rhodes v. Robinson</i> ..	31
692, 719		— <i>d. Riddell v. Gwinnell</i> ..	82
— <i>d. Knott v. Lawton</i>	724	— <i>d. Roake v. Nowell</i>	838
— <i>d. Lambourn v. Pedgriph</i>	12	— <i>d. Roberts v. Roberts</i> ..	719
— <i>d. Lean v. Lean</i>	724	— <i>d. Robertson v. Gardiner</i>	29
— <i>d. Le Chevalier v. Huth-</i>		— <i>d. Robinson v. Dobell</i> ..	28
— <i>waite</i>	920	— <i>d. Roby v. Maisey</i>	15
— <i>d. Leeson v. Sayer</i>	11	— <i>d. Rogers v. Cadwallader</i> 15, 17	
— <i>d. Leicester v. Biggs</i> 352, 555		— <i>d. Rogers v. Pullen</i>	18
— <i>d. Lempriere v. Martin</i> ..	56	— <i>d. Roylance v. Lightfoot</i>	15
— <i>d. Lewis v. Lewis</i>	52	— <i>d. Sams v. Garlick</i>	722
— <i>d. Lewis v. Rees</i>	150	— <i>d. Shelley v. Edlin</i> 355, 356, 909	
— <i>d. Lindsey (Earl of) v.</i>		— <i>d. Shore v. Porter</i>	627
— <i>Colyear</i>	751	— <i>d. Small v. Allen</i> 720, 725, 927	
— <i>d. Liversage v. Vaughan</i>	651	— <i>d. Smith v. Galloway</i> ..	929
— <i>d. Lloyd v. Jones</i>	150	— <i>d. Smith v. Webber</i>	688
— <i>d. Lloyd v. Passingham</i> ..	341	— <i>d. Snell v. Tom</i>	15
— <i>d. Lord v. Crago</i>	26	— <i>d. Southouse v. Jenkins</i>	657
— <i>d. Lord v. Macartney</i> ..	32	— <i>d. Speneer v. Clark</i> ..	727, 749
— <i>d. Lowes v. Davidson</i> ..	152	— <i>d. Stanway v. Rock</i> 12, 18, 20	
— <i>d. Lumley v. Scarborough</i>	470	— <i>d. Stevens v. Scott</i>	355
— <i>d. Lyde v. Lyde</i>	654, 688	— <i>d. Stewart v. Sheffield</i>	801, 912
— <i>d. Lyster v. Goldwin</i> 14, 30, 31		— <i>d. Strong v. Goff</i>	613
— <i>d. Mann v. Walters</i>	31	— <i>d. Templeman v. Martin</i>	935
— <i>d. Martin v. Watts</i>	24	— <i>d. Thomas v. Beynon</i> ..	936
— <i>d. Mathewson v. Wright-</i>		— <i>d. Thomas v. Field</i>	22
— <i>man</i>	28	— <i>d. Thomas v. Roberts</i> ..	8

	PAGE		PAGE
Doe <i>d. Thompson v. Amey</i>	24, 25	Doe <i>v. Cooper</i>	658
— <i>d. Thompson v. Pitcher</i>	538,	— <i>v. Copestake</i>	564
546, 547		— <i>v. Crick</i>	29, 32
— <i>d. Tilt v. Stratton</i>	29	— <i>v. Culliford</i>	31
— <i>d. Timmis v. Steele</i>	52	— <i>v. Cundall</i>	722
— <i>d. Todd v. Duesbury</i>	652, 686,	— <i>v. Dacre</i>	835
688		— <i>v. Davies</i>	12
— <i>d. Tomes v. Chamberlaine</i>	12, 18	— <i>v. Dorvell</i>	656
— <i>d. Tomkyns v. Willan</i>	356,	— <i>v. Dunbar</i>	31
362		— <i>v. Evans</i>	790
— <i>d. Tooley v. Gunniss</i>	651	— <i>v. Field</i>	353
— <i>d. Tremewen v. Permewan</i>	751	— <i>d. Fonnereau</i>	439
— <i>d. Tucker v. Morse</i>	24	— <i>v. Glover</i>	973
— <i>d. Tyrrell v. Lyford</i>	929	— <i>v. Goddard</i>	56
— <i>d. Vessey v. Wilkinson</i>	666, 834	— <i>v. Goff</i>	611, 612, 619
— <i>d. Viner v. Eve</i>	720	— <i>v. Gower</i>	9
— <i>d. Warner v. Browne</i>	23, 29	— <i>v. Gwillim</i>	725
— <i>d. Watson v. Fletcher</i>	282	— <i>v. Hardy</i>	927
— <i>d. Watt v. Morris</i>	9	— <i>v. Hawke</i>	982
— <i>d. Wellard v. Hawthorn</i>	545,	— <i>v. Hilder</i>	233
548		— <i>v. Holmes</i>	721
— <i>d. Wells v. Scott</i>	872	— <i>v. Homfray</i>	353
— <i>d. Westlake v. Westlake</i>	929,	— <i>v. Hopkinson</i>	654, 841
937		— <i>v. Hull</i>	9
— <i>d. Whayman v. Chaplin</i>	29	— <i>v. Humphreys</i>	33
— <i>d. Wheedon v. Lea</i>	837	— <i>v. Huthwaite</i>	923, 925
— <i>d. Wheeldon v. Paul</i>	298	— <i>v. Ironmonger</i>	354, 602
— <i>d. Whitaker v. Hales</i>	29	— <i>v. Jones</i>	12, 62, 710
— <i>d. White v. Simpson</i>	360	— <i>v. Kightley</i>	28, 31
— <i>d. Wilkinson v. Goodier</i>	15	— <i>v. Laming</i>	864
— <i>d. Williams v. Lloyd</i>	545	— <i>v. Langton</i>	929
— <i>d. Winter v. Perratt</i>	470,	— <i>v. Lea</i>	823, 829, 830
473, 478		— <i>v. Lightfoot</i>	14, 996
— <i>d. Woodall v. Woodall</i>	614	— <i>v. Lucraft</i>	649, 687
— <i>d. Woodcock v. Barthrop</i>	354,	— <i>v. Luxton</i>	51, 54
359		— <i>v. Lyde</i>	862
— <i>v. Allen</i>	722, 941	— <i>v. Martin</i>	70, 717
— <i>v. Applin</i>	863	— <i>v. Milborne</i>	393
— <i>v. Bartle</i>	892	— <i>v. Miller</i>	12
— <i>v. Batten</i>	32	— <i>v. Moore</i>	840
— <i>v. Bennett</i>	996	— <i>v. Morphett</i>	31
— <i>v. Britain</i>	380	— <i>v. Needs</i>	941
— <i>v. Browne</i>	30	— <i>v. Owens</i>	722
— <i>v. Burnsall</i>	622	— <i>v. Palmer</i>	33
— <i>v. Carter</i>	10, 20, 982	— <i>v. Perkins</i>	8
— <i>v. Cavendish (Ld. George)</i>	411	— <i>v. Phillips</i>	721, 722
— <i>v. Challis</i>	870	— <i>v. Pitcher</i>	564
— <i>v. Charlton</i>	651	— <i>v. Pritchard</i>	787
— <i>v. Claridge</i>	360	— <i>v. Read</i>	30
— <i>v. Clarke</i>	301, 801	— <i>v. Richards</i>	722
— <i>v. Clayton</i>	722	— <i>v. Ridout</i>	27
— <i>v. Coleman</i>	722	— <i>v. Rivers</i>	709
— <i>v. Collis</i>	621	— <i>v. Roberts</i>	935
— <i>v. Coltman</i>	78	— <i>v. Robinson</i>	56

	PAGE		PAGE	
Doe v. Roe	11	Drakeley's Estate, In Re	511, 512, 898, 899	
— v. Scudamore	60	Dreunan v. Andrew	875	
— v. Selby	651	Drew v. Killick	642	
— v. Shotter	354	Drewell v. Towler	168	
— v. Simpson	358, 616	Drewett v. Pollard	517, 518	
— v. Snelling	721	Drinkwater v. Combe	953, 954	
— v. Thomas	260	Drury v. Drury	76	
— v. Tucker	725	— v. Kent	146	
— v. Turner	10, 13	Drybutter v. Bartholomew ..	68	
— v. Wainwright	656	Dubber d. Trollope v. Trollope	615, 752, 864	
— v. Watkins	32	Duberley v. Page	141	
— v. Webber	616	Duck v. Braddyl	314	
— v. Weller	70	Dudden v. Clutton Union, Guar-	dians of	192, 196
— v. Wetton	655	Dudley v. Ward	105	
— v. Whitehead	708	Dudley Canal Co. v. Grazebrook	211	
— v. Williams	724	Duffield v. Duffield	833, 841	
— v. Woodhouse	724	Dugdale v. Robertson	209, 213	
— v. Woodman	32	Du Hourmelin v. Sheldon ..	783	
— v. Wright	545	Dumball v. Walters	201	
Doidge v. Carpenter	148	Dumoncel v. Dumoncel	782	
Dolan v. Macdermot	539, 573	Duncan, In re; In re Taylor's	Trusts	586
Dolton v. Hewen	721	— v. Louch	218	
Dommett v. Bedford	978, 979, 982	Duncomb v. Duncomb	69	
Don's Estate, Re	736	Duncomb's Case	218	
Donaldson v. Donaldson	306	Duncombe v. Mayer	88	
Doncaster v. Doncaster	488	— v. Randall	220	
Donellan v. O'Neill	537, 588	Dundas v. Wolfe-Murray	422, 852	
Donisthorpe v. Porter	952	Dundee (Magistrates of) v.	Morris	582
Donn v. Penny	692, 865	Dungannon (Lord) v. Smith ..	465, 466, 482	
Doo v. Brabant	873, 874	Dunk v. Fenner	610, 615, 688, 862	
Doolan v. Smith	664	Dunn v. Birmingham Canal Co.	211	
Doran v. Wiltshire	113	— v. Bownas	556, 559	
Dorchester (Lord) v. Effingham	(Earl of)	— v. Bryan	108	
Dorin v. Dorin	931	— v. Green	55	
Dorling v. Claydon	735	Dunne v. Dunne	87, 88	
Dormer's Case	747, 751	Dunne's Trusts	Add.	
Dorsett v. Dorsett	979	Dunraven (Earl of) v. Llewel-	lyn	143
Douglas v. Congreve	602, 608, 609, 862, 863	Duplessis v. Attorney-General	781	
— v. Fellows	922, 926, 935, 937	Duppa v. Mayo	298, 319	
Dover v. Alexander	930	Durell v. Pritchard	203, 227	
Dowling v. Dowling	655	Durham and Sunderland Rail-	way Co. v. Walker	170, 206, 295
Downe (Viscount) v. Morris ..	777	Durour v. Motteux	532, 538	
Downes v. Craig	278	Durrant v. Friend	928	
Downhall v. Catesby	720	Dutton, Re	496, 540	
Dowset v. Sweet	910, 919, 934, 936, 937	— v. Crowdy	659, 911	
Dowties's Case	738, 787			
Drake v. Drake	926, 937, 942			
— v. Munday	15			
Drakeford v. Drakeford ..	912, 914			
— v. Wilks	927, 928			

	PAGE		PAGE
Dutton v. Engram	374	Edwards v. Exeter (Bishop of)	264
—— v. Taylor	178	—— v. Freeman	344
Dwyers, Minors, In re	76, 77	—— v. Hall	554, 556, 560
Dyce v. Hay	206	—— v. Hammond	838, 839
Dyer v. Dyer ..	367, 642, 886, 928	—— v. Pike	563
Dyghby's Case	270, 271	—— v. Saloway	909
Dyke v. Rendall	76	EDWARDS v. SLATER	368
—— v. Walford	784	——	348, 376, 386
		—— v. Symons	837
		—— v. Tuck ..	511, 512, 516, 518, 661
E.		Egan v. Morris	616, 655
Eadon v. Jeffcock	209	Egerton v. Jones	468, 687
Eagle v. Charing Cross Rail- way Co.	229	Egremont (Lord) v. Pulman ..	218
Eagles v. Le Breton	888, 897	Eisdell v. Hammersley	384
Eagleton v. Gutteridge	322	Elborne v. Goode	507, 512, 518
Eales v. Cardigan (Earl of) ..	899	Eldridge v. Stacey	322
—— v. Conn	470	Ellicock v. Mapp	784
—— v. Drake	417, 909	Ellicombe v. Gompertz	653
—— v. England	909	ELLIOT v. DAVENPORT	902
Earle v. Wilson	934	——	904
Early v. Benbow	808	—— v. Merryman	377
—— v. Middleton	808	—— v. North-Eastern Rail- way Co.	180, 209, 213
East v. Twyford	614, 616	Elliottson v. Feetham	216
East India Co. v. Vincent	171	Elliott v. Elliott	492, 805, 886
Eastern Counties Railway Com- pany v. Tuffnell	1001	—— v. Fisher	1010
Eastman v. Baker	687	—— v. Johnson	24, 26
Eastwood v. Avison ..	648, 649, 651	Ellis v. Bridgenorth (Mayor of)	169
—— v. Lockwood	870	—— v. Ellis	848
—— v. Vincke	735	—— v. Houston	Add.
Easum v. Appleford	508	—— v. Manchester Carriage Company (Limited) ..	174
Eaton v. Hewitt	835	—— v. Maxwell ..	508, 509, 510, 511
—— v. Swansea Waterworks Company	187, 190	—— v. Selby	540, 582, 617
Eccles v. Birkett	849, 854	—— v. Taylor	324, 326
—— v. Cheyne	916	Ellison v. Airey	480, 804
Ecclesiastical Commissioners v. Merral	25	Elmsley v. Young	897
Eddel's Trusts	355, 473, 841	Eltham (Parish) v. Warreyn	538, 574
Eddowes v. Eddowes	807	Elton v. Eason	618, 686
Edenborough v. Canterbury (Archbishop of) ..	265, 266, 273	—— v. Elton	845, 848
Edgeworth v. Edgeworth ..	834, 872	Elvis v. York (Archbishop of)	272
Edgington's Trusts, Re	978	Elwell v. Crowther	192
Edmondson's Estate, In re ..	476, 843, 853	Elves v. Mawe	35, 105
Edmunds v. Fessey	930	Elwin v. Elwin	847
—— v. Waugh ..	662, 845, 942	Ely (Dean and Chapter of) v. Warren	137
Edwardes v. Jones	898	Embrey v. Martin	858
Edwards v. Alliston	656	—— v. Owen	192, 193, 194
—— v. Champion	56, 884, 887, 891	Emerton v. Selby	129
		Emes v. Hancock	858
		Emmot v. Cole	296
		Emperor v. Rolfe	858

	PAGE		PAGE
English, In re	722	Farrant v. Nicholls	617
— v. Orde	554	Farrelly v. Robins	12, 14
Ennor v. Barwell	195	Farrer v. St. Catherine's Col- lege, Cambridge	662, 940
Eno v. Eno	488, 654	Farrow v. Rees	953
Entwistle v. Davis	553, 560, 561	Farthing v. Allen	654
— v. Markland	847	Faulkner v. Daniel	98, 466, 470, 956, 958, 961
Erne (Earl of) v. Armstrong . .	30	— v. Elger	266
Espley v. Wilkes	176	Faversham (Mayor of) v. Ryder .	557
Etches v. Etches	835, 978	Fawcett v. Lowther	744
Ettricke v. Ettricke	896	— v. Strickland	141
Eustace v. Scawen	890	Fay v. Prentice	193, 200
Evans v. Angell	929, 935	Feakes v. Standley	686, 688
— v. Brown	778	Fearon v. Webb	265
— v. Davies	932	Felan v. Russell, Ex parte . .	542
— v. Elliot	17	Fell v. Biddolph	913
— v. Harris	807	Feltham's Trusts, In re	937
— v. Hellier	507, 508, 512, 517, 518	Fenn v. Bittleston	15
— v. Jones	803	Fenton v. Logan	318
— v. Massey	931, 934	— v. Wills	917
— v. Scott	858	Fenwick v. Mitforth	733
— v. Stratford	873	— v. Potts	357
— d. Brook v. Astley	653	— v. Reed	181
Everest v. Gell	686	Ferrand v. Bradford (Corpora- tion of)	212
Evers v. Challis	490, 601, 870	— v. Wilson 112, 488, 489, 518	
Ewart v. Cochrane	174	Ferrier v. Jay	418, 421
— v. Graham	152	Festing v. Allen 363, 477, 840, 841, 852, 853	
Ewen v. Bannerman	581	Fetherston v. Fetherston	608, 609, 614, 619, 752
Ewen's Case	48	Fewster v. Turner	175
Ewington v. Fenn	660, 898	Field, Re	997
Exall v. Partridge	299	— v. Brown	112
Exel v. Wallace	728	Fielden v. Ashworth	897
Exeter (Bishop of) v. Marshall .	269, 270	Finch v. Lane	839
Exhall Coal Mining Co., In re .	327	— v. Squire	559
Eyre v. Marsden 509, 511, 512, 516, 518, 911		Finch's (Sir Moyle) Case	11, 258
Eyston v. Symonds	782	Findon v. M'Laren	314
Eyton v. Denbigh, &c., Rail- way Company	293, 294	Finlinson v. Porter	218
F.		Finney's Estate, Re	995
Fahy v. O'Donnell	22	Firth v. Purvis	324
Fairchild v. Gayre	258, 259	Fish v. Att.-Gen.	581
Fairfax v. Heron	722, 723	— v. Klein	62
Fairley v. Tuck	79	Fisher v. Prosser	9
Falkiner v. Hornidge	690	Fisher v. Brierley	544, 545, 546, 547, 554, 570
Falkner v. Butler	406	— v. Dixon	105
Farewell v. Dickenson	296	— v. Moon	172, 230
Farley v. Bonham	72	— v. Prowse	219
Farmer v. Francis	358, 491	— v. Webster	654, 679
Farncombe's Trusts, In re . . .	403, 405	— v. Wigg	751, 894
Farrant v. Lovel	115	Fisk v. Att.-Gen.	582

	PAGE		PAGE
Fitzgerald's Estate, In re	98	Foster v. Ramsay	920
Fitzgerald v. Fitzgerald	657	——— v. Romney	651
——— v. Leslie	753	——— v. Smith	101
Fitzhenry v. Bonner	647	——— v. Wybrants	867
Fitzhugh's Case	370	Foulger v. Taylor	314, 319
Fitzmaurice v. Murphy	100	Fourdrin v. Gowdey	62, 562, 783
Fitzroy v. Richmond (Duke of) .	413, 912	Fowkes v. Joyce	315
Fitz-William's Case	370	Fowle v. Welsh	332
Flack v. Longmate	72	Fowler v. Cohn	421
Flanagan v. Seaver	21, 104	——— v. Fowler	582
Fleming v. Fleming	886, 929, 936	——— v. Lightburne	361
——— v. Smith	791	Fowler's Trust, In re	414
Fletcher v. Ashburner	366	Fox v. Amhurst	148, 153
——— v. Gt. Western Ry. Co. .	211	Fox v. CHESTER (The Bishop	
——— v. Moore	305	of)	238
——— v. Rylands	198	———	255, 277
——— v. Saunders	325	——— v. Clarke	168
——— v. Smith	198	——— v. Collins	938
——— v. Smiton	724	——— v. Dalby	14
——— v. Sondes (Lord)	281	——— v. Fox	849, 850
Flight v. Thomas	167, 187, 189, 190	——— v. Garrett	800
Floyer v. Bankes	488, 489	——— v. Lowndes	564
Foley v. Burnell	502, 975	——— v. Mackreth	367
Folkes v. Western	896	——— v. Porter	476
Follett v. Tyrer	61	Foy v. Foy	555
Fonereau v. Fonereau	647, 723, 823, 827, 849, 862, 871	——— v. Hynde	463, 639
Footner v. Cooper	725	Fracie v. Glover	719
Foquet v. Moor	28	Francis v. Doe d. Harvey . . .	32
Forbes v. Ecclesiastical Com- missioners of England	142	Frank v. Stovin	606, 618, 619
FORBES v. MOFFATT	943	Franklin v. Carter	299
———	954, 961	——— v. Lay	752
Ford v. Peering	88, 89	Franks v. Price	834
——— v. Rawlins	845, 854	Fraser v. Pigott	930, 931
——— v. Tynte	109, 111, 115	Frazer v. Pigott	920
Fordyce v. Bridges	304	Frederick v. Att.-Gen.	742
——— v. Ford	862	——— v. Hall	663
——— v. Willis	366	Freeland v. Pearson	906, 916
Forrest v. Whiteway	648, 657, 887	Freeman v. Bowen	979
Forsbrook v. Forsbrook	495, 616, 753	Freemantle v. Freemantle . . .	801
Forster, Ex parte	858	Freke v. Carbury (Lord) . . .	508
——— v. Forster	600	French v. Cadell	687
Fort v. Ward	148	——— v. French	679, 680
FORTH v. CHAPMAN	682	Frewen v. Frewen	275
———	466, 649, 686, 719, 753, 863	——— v. Phillips	185, 186
Foskew's Case	751	Frier v. Peacock	573
Foster v. Cautley	666	Frith v. Cameron	87
——— v. Cook	871	Frogatt v. Wardell	679
——— v. Crabb	88	Frogmorton v. Holyday	722
——— v. Hayes	651	——— v. Wright	725
		——— d. Robinson v.	
		Wharrey	605
		Fry, Re	940
		——— v. Capper	487, 493, 418
		——— v. Noble	75, 79

	PAGE		PAGE
Fry's (Lady) Case	835	Gaskell v. Harman.....	847
Fuller v. Chamier	603, 616	Gaskin v. Rogers	562
—— v. Fuller	905	Gate v. Wiseman	67
Fulmerston v. Steward 256, 257, 638		Gates v. Jones.....	541, 577
Fulwood's Case	371	Gateward's Case.....	131, 137
Furneaux v. Fotherby	323	Gaunt v. Fynney.....	227
Furnival v. Grove.....	24, 28	Gauntlett v. Carter	935
		Gaved v. Martyn....	167, 187, 200
		Gawdy v. Canterbury (Arch- bishop of)	259, 273
G.		Gawler v. Standerwick	857
Gabb v. Prendergast....	930, 932	Gay v. Gay	639
Gaffee's Settlement, In re....	985	Gayford v. Moffatt..	179, 182, 223
Gage v. Acton.....	300	—— v. Nicholls	213
Gaitskell's Trusts, Re	915	Geddis v. Bann Reservoirs (Pro- prietors of)	217
Gale v. Abbot.....	205	Gee v. Audley	465, 487
—— v. Bennet	617	—— v. Liddell.....	466, 467
—— v. Burnell	15	—— v. Manchester (Mayor of)	689
—— v. Gale	891	Gent v. Harrison	111, 112
Gall v. Esdaile	725	Geohagan v. Fegan.....	173
Gally v. Selby.....	267	George ap Rice's Case	107
Gammell v. Woods and Forests (Commissioners of).....	133	Geraghty v. McCann	173
Gann v. Free Fishers of Whit- stable	133	Gerrard v. Butler.....	407, 493
Gant v. Laurence	897	—— v. Cooke....	170, 218, 220
Garbut v. Hilton.....	848	—— v. Gerrard	68
Garde v. Garde	717	Gery v. Redman	151
Garden v. Pulteney	680	Gibbon v. Warner	896
Gardiner v. Griffith	267	Gibbons v. Maltyard	536, 537
—— v. Slater	846	—— v. Snape	758
—— v. Stevens	646, 647	Gibbs v. Cruikshank	16
Gardiner's Estate, In re	801, 805, 806	—— v. Tait	865
Gardner v. Harding	724	Giblett v. Hobson	554, 555
—— v. London, Chatham & Dover Rail. Co. ..	561	Gibson, Re	910
GARDNER v. SHELDON	625	—— v. Gibson	78
——	753	—— v. Ireson	315
Garland v. Beverley	939	—— v. Montford (Lord)....	360
—— v. Brown	480	—— v. Rogers	355
Garmstone v. Gaunt	93	—— v. Wells	110
Garner v. Garner	936	Gilbert v. Boorman	805
—— v. Hannyngton	88, 90	—— v. Lewis	974
Garnett v. Armstrong	963	—— v. Witty	658
Garrard v. Tuck	17	Gilbertson v. Richards....	343, 492
Garratt v. Cockerell	693	Gill v. Bagshaw	942
Garraway's (Alderman) Case .	375	—— v. Shelley	920, 928, 930
Garrick v. Taylor	886	Gillam v. Taylor.....	536
Garritt v. Sharp	234	Gillett v. Gane	940
Garth v. Baldwin	355, 862	Gilliland v. Crawford.....	87
—— v. Cotton 111, 112, 115, 116,		Gilman v. Daunt.....	805
——	899	—— v. Elton	315
—— v. Meyrick	936	Gilmore v. Severn	805
		Gimblett v. Burton..	801, 805, 806
		Ginger d. White v. White....	651
		—— v. White.....	621

	PAGE		PAGE
Girdlestone <i>v.</i> Creed	570	Goodright <i>v.</i> Jones	835
Girdwood <i>v.</i> Belfast Water Commissioners	212	——— <i>v.</i> Mead	709
Gisbourn <i>v.</i> Hurst	315	——— <i>v.</i> Pullyn	615, 751
Gittings <i>v.</i> McDermott	907	——— <i>v.</i> Searle	744
Glanvill <i>v.</i> Glanvill	839, 842	——— <i>v.</i> Stocker	721
Glass <i>v.</i> Richardson	392	——— <i>v.</i> Wright	905
Glave <i>v.</i> Harding	173	Goodtitle <i>d.</i> Galloway <i>v.</i> Herbert	13, 20
Glenorchy (Lord) <i>v.</i> Bosville	113, 366, 483, 493, 623, 624, 661, 683, 868	——— <i>d.</i> Hayward <i>v.</i> Whitby	359, 837
Gloucester (Mayor of) <i>v.</i> Wood	572, 578	——— <i>d.</i> Newman <i>v.</i> Newman	730
Glover <i>v.</i> Coleman	186, 187	——— <i>d.</i> Richards <i>v.</i> Edmonds	720
——— <i>v.</i> Lane	140	——— <i>d.</i> Sweet <i>v.</i> Herring	613
——— <i>v.</i> Monckton	687	——— <i>v.</i> Edmonds	722
——— <i>v.</i> North Staffordshire Railway Company ..	228	——— <i>v.</i> Maddern	721
——— <i>v.</i> Shedd	270	——— <i>v.</i> Newman	65, 301
——— <i>v.</i> Strothoff	862	——— <i>v.</i> Otway	683, 727
Glubb <i>v.</i> Att.-Gen.	523, 554	——— <i>v.</i> Pegden	684, 686
Glynne <i>v.</i> Nichols	193	——— <i>v.</i> Southern	920, 935
Goblet <i>v.</i> Beechey	934	——— <i>v.</i> Stokes	894
Godden <i>v.</i> Crowhurst	977	——— <i>v.</i> Whitby	829, 830
Godfrey <i>v.</i> Davis	804, 928	——— <i>v.</i> Wood	446, 450, 455
——— and Dixon's Case	782	Goodwin's Trusts, In re	933
Godolphin <i>v.</i> Abingdon	733	Goodwin <i>v.</i> Finlayson	911
——— <i>v.</i> Swinburne	828	Goold <i>v.</i> Great Western Deep Coal Company	177
Going <i>v.</i> Hanlon	728	——— <i>v.</i> Teague	1001
Goldham <i>v.</i> Edwards	278	Gordon <i>v.</i> Adolphus	686, 835
Goldney <i>v.</i> Crabb	867	——— <i>v.</i> Atkinson	896
Golds <i>v.</i> Greenfield	906	——— <i>v.</i> Gordon	794, 934
Goldsmid <i>v.</i> Goldsmid	413	——— <i>v.</i> Hoffman	663
——— <i>v.</i> Tunbridge Wells Improvement Commissioners ..	216	——— <i>v.</i> Whieldon	678, 900
Gooch <i>v.</i> Gooch	807	——— <i>v.</i> Woodford	113
Good <i>v.</i> Bates	751	Gore (a minor), In re	98
Goodale <i>v.</i> Gawthorne	301, 739	——— <i>v.</i> Gore	438, 452
Goodfellow <i>v.</i> Goodfellow	668	——— <i>v.</i> McDermott	133
Goodiar <i>v.</i> Clarke	347	Gorges <i>v.</i> Stanfield	166
Goodlad <i>v.</i> Burnett	663	Gorham <i>v.</i> Exeter (Bishop of) ..	269
Goodland <i>v.</i> Blewith	300	Goring <i>v.</i> Bickerstaffe	437, 443
Goodman <i>v.</i> Goodright ..	439, 456	Gorman <i>v.</i> Byrne	341
——— and Gore's Case	204	Gorst <i>v.</i> Lowndes	508, 510
Goodright <i>d.</i> Docking <i>v.</i> Dunham	651	Gorton <i>v.</i> Falkner	314, 318
——— <i>d.</i> Drewry <i>v.</i> Barron ..	727	Gosling <i>v.</i> Gosling ..	483, 492, 493, 517, 576, 852, 975
——— <i>d.</i> Hoskins <i>v.</i> Hoskins ..	646	Goss <i>v.</i> Nelson	830
——— <i>d.</i> Lisle <i>v.</i> Pullyn ..	609	——— <i>v.</i> Tracy	928
——— <i>d.</i> Lloyd <i>v.</i> Jones ..	651	Gossage <i>v.</i> Taylor	605
——— <i>d.</i> Revell <i>v.</i> Parker ..	837	Gosses's Settlement, In re	412
——— <i>v.</i> Cator	378	Gotch <i>v.</i> Foster	422, 852
——— <i>v.</i> Cordwent	32	Gott <i>v.</i> Nairne	275
——— <i>v.</i> Dunham	652	Gough <i>v.</i> Davies	793
——— <i>v.</i> Goodridge	649	Goulburn <i>v.</i> Brooks	858

	PAGE		PAGE
Gould v. Bradstock.....	322	Greene v. Cole.....	110
Gowan v. Broughton.....	917	—— v. Potter.....	838
Gower v. Gower.....	961	—— v. Ward.....	655
—— v. Grosvenor.....	867	Greenhill v. Greenhill.....	729
Goymour v. Pigge.....	651, 652	Greenslade v. Dare.....	274
Grafton (The Duke of) v. Han-		Greenway v. Greenway ..	656, 686,
mer.....	56		690, 694, 752
Graham v. Allsopp.....	300	Greenwich Board of Works v.	
—— v. Lee.....	980	Maudsley.....	233
—— v. Paternoster ..	554, 557,	Greenwood v. Evans	94, 95, 96
	558	—— v. London (Bishop	
—— v. Peat.....	10	of).....	276, 277
—— v. Wickham.....	416	—— v. Roberts.....	476
Grand Junction Railway Com-		—— v. Rothwell.....	622
pany v. Shugar.....	197	—— v. Verdon	654, 689
Grand Union Canal Company		Greenwood's Will, In re	897
v. Ashby.....	152	Greet v. Greet.....	491, 852
Grange v. Tiving.....	377	Gregg v. Coates.....	110
Grant, Ex parte.....	58	Gregory's Settlement and Will,	
—— v. Grant.....	936, 938	Re.....	936, 937, 941
—— v. Gunner.....	141	Gregory v. Henderson....	354, 355
—— v. Winbolt.....	645	—— v. Mighell.....	171
Gravenor v. Hallum	538, 565	—— v. Smith.....	888
—— v. Watkins.....	728	Gregson's Trusts, In re ..	937, 942
Graves v. Dolphin.....	974, 976	Greig v. Martin.....	942
—— v. Hicks.....	328	Grendon v. Lincoln (Bishop of)	260,
—— v. Waters.....	661		271
—— v. Weld.....	103	Gresley v. Mousley.....	111
Gray v. Bond.....	182, 185	Greswold's Case.....	345
Grayson v. Atkinson	725, 726	Greswold v. Marsham.....	964
Great Southern & Western		Gretton v. Hayward.....	613
Railway Company, In re ;		Greville v. Browne.....	993
Ex parte Duke of Leinster..	759	Grey v. Hesketh.....	278
Great Western Railway Com-		—— v. Mannock.....	54
pany v. Bennett.....	211	—— v. Pearson.....	751
—— v. Fletcher.....	211	Grice v. Shaw.....	953, 961
—— v. Smith ..	209	Grieve v. Grieve.....	674
Greated v. Greated..	688, 873, 973,	Grieves v. Case ..	544, 546, 554, 558
	974	Griffith v. Blunt	476, 492, 842
Greatrex v. Hayward	198, 199	—— v. Pownall ..	476, 484, 488
Greaves v. Simpson.....	622	Griffiths v. Evan.....	618
Green's Case.....	259, 262, 270	—— v. Gale.....	916
—— Estate, Re.....	872, 873	—— v. Grieve.....	469, 719
—— Trusts, Re.....	915	—— v. Puleston.....	320
Green v. Armstead.....	724	GRIFFITHS v. VERE.....	497
—— v. Britten.....	556		440, 448, 505
—— v. Gascoyne.....	507, 511	Grimman v. Legge.....	28
—— v. Green.....	389, 614, 656, 694	Grimmett v. Grimmett....	557, 558
—— v. Harvey.....	973	Grimshawe v. Pickup.....	688
—— v. Howard.....	536	Grimson v. Downing.....	610, 613
—— v. Marsden.....	726	Grimstead v. Marlowe.....	134
—— v. Smith.....	730	Grimwood v. Moss.....	312
—— v. Spicer.....	976	Grisbrook's Case.....	3
—— v. Stephens.....	658, 660	Grogan v. Dopping.....	418, 488

	PAGE		PAGE
Grove's Trusts, Re	855	Hall's Estate, In re	84
Grumble v. Jones.....	469, 719	Halton v. May	975
Guillamore (Lord) v. O'Grady	927	Ham's Trusts.....	911, 913, 917
Gullett v. Lopes	133	Hamell v. Hunt	894
Gulliver v. Vaux.....	972, 973	Hamer v. Knowles.....	208
—— v. Wickett..	438, 450, 870	—— v. Tilsley.....	87
Gully v. Exeter (Bishop of) ..	263,	Hamerton v. Stead.....	27
	722	Hamilton (Duke of) v. Graham ..	170
Gummoe v. Howes.....	614, 615	—— v. Jackson	77
Gunter v. Gunter	959	—— v. West	613, 619
Gunnall v. Wood.....	438	Hammerton's Case	342
Gwam v. Roe	341	Hammond v. Hall	196
Gwillim v. Holland	950	Hampshire v. Peirce ..	919, 924, 941
Gwynne v. Berry.....	687, 719	Hampton v. Hodges	108
Gwyther v. Allen	518	Hanbury v. Tyrell..	403, 404, 406
Gyles v. Colshil	262	Hancock v. Austin	312, 322
		Hand v. Hall	23
		—— v. North.....	883, 888
		Hanks v. Cribbin	182
		Hanner v. Chance.....	137, 190
		Hanna v. Bell	808
		Hannaford v. Hannaford ..	657, 658,
			660
		Hannam v. Sims	915
		HANSON v. GRAHAM.....	822
		—— 832, 846, 848, 849	
		—— v. Lake	1001
		Harbidge v. Warwick ..	185, 186, 189
		Harbin v. Masterman....	517, 576
		Hardcastle v. Dennison	727
		—— v. Hardcastle	849
		Harding v. Glyn.....	366, 666
		—— v. Nott.....	466, 483
		—— v. Wilson.....	175, 176
		Harding's Estate, In re.....	189
		Hardwicke v. Thurston	909
		Hare v. Bickley	270
		Harman v. Dickenson	646
		—— v. Forster	953
		—— v. Renew.....	260
		Harnett v. Maitland.....	22, 110
		Harries' Trusts, In re	406
		Harrington (Countess of) v.	
		Harrington (Earl of) ..	483, 484
		—— (Earl of) v. Ram-	
		say	34
		Harrington's Case	158
		—— Trusts, Re ..	791, 793
		Harris v. Austen.....	262
		—— v. Barnes.....	523, 554
		—— v. Davis..	466, 469, 636, 694,
			719, 752, 914
		—— v. Du Pasquier	644
		—— v. Harris.....	95, 664

H.

Habershon v. Vardon.....	541
Hackett v. Baiss	225
Hackney Charities, In re	586
Haddelsey v. Adams ..	360, 602, 617,
	898, 899
Hadfield's Case	343
Hadwen v. Hadwen	623
Hagarty v. Nally	54
Hagger v. Payne	804
Haig v. Homan	963
Hainault Forest Act, 1858, In re	137
Haines v. Welch.....	35
Haldane v. Johnson	298
Hale, Ex parte; in re Binns..	327
—— v. Hale	476
—— v. Oldroyd	232
—— v. Pew.....	410, 494
Hales v. Risley	344, 489
Haley v. Bannister..	508, 510, 512
—— v. Petit	787
Halford v. Dillon	67
—— v. Stains.....	512, 515
Hall v. Byron.....	139, 143, 148
—— v. Deering	687
—— v. Harding.....	145, 146
—— v. Hurt	328
—— v. Leitch	665
—— v. Lund	174
—— v. May	1007
—— v. Nalder	867
—— v. Robertson	801
—— v. Swift	187, 223, 236
—— v. Warren	566, 873

	PAGE		PAGE
Harris v. Lincoln (Bishop of) . .	685, 920	Hawkins v. Allen	544, 555
— v. Mott	61	— v. Carbines	206, 221
— v. Pugh	353	— v. Chappel	262, 275
— v. Ryding	207, 209	— v. Gathercole	268
Harrison's Estate, In re . .	646, 722, 723, <i>Add.</i>	— v. Hamerton	686, 898
Harrison v. Barton	886	— v. Hawkins	99, 784
— v. Foreman	896	— v. Kelley	302
— v. Great Northern Railway Company . .	218	— v. Luscombe	353, 355
— v. Grimwood	492, 849, 850	— v. Shewin	736
— v. Harrison	508, 559, 619, 622, 808	— v. Walrond	325
— v. Hyde	935	Hay v. Palmer	301
— v. Naylor	856	— v. Watkins	419
— v. Round	957	Hayden v. Kirkpatrick	966
— v. Southampton (Mayor of)	568	— v. Tiverton (Overseers of)	343
Harrop's Estate, Re	791	Hayes dem. Foorde v. Foorde	601, 604, 606, 607, 662
Harrop v. Hirst	193	— v. Bridges	123, 130, 133
Hart v. Durand	930	— v. Hayes	102
— v. Middlehurst	661	Haynsworth v. Pretty	638
— v. Tulk	927	Haynsworth's Case	639
Hart's Trusts, Re	842, 849	Hayter v. Trego	578
Hartley v. Moxham	322	— v. Tucker	561
— v. Tribber	932	Hayward v. Cannington	136
Harton v. Harton	354, 357	— v. Pile	92
Hartopp and Cock's Case	257	Hazard v. Robinson	177
Hartshorne v. Nicholson	556	Head v. Randall	888
Harvey v. Ashley	76	Healey v. Batley (Corp. of)	233
— v. Harvey	92, 483, 800	Healy v. Healy	937, 938
— v. Pocock	329	Heard v. Cuthbert	1001
— v. Stracey	404, 407, 412, 487, 493, 804	Hardson v. Williamson	358, 360, 362
— v. Towell	862, 867	Hearle v. Greenbank	61, 263
— v. Walters	167, 236	Hearn v. Tomlin	13
Harvie v. Rogers	231	Heasman v. Pearse	307, 470, 889, 891
Hasluck v. Pedley	309, 310	Heath v. Bucknall	226
Hassard v. Cantrell	139, 143	— v. Chapman	542, 543
Hassell v. Gouthwaite	51	— v. Elliott	132
Hastings' (Kensington) Case	574	— v. Heath	439, 450, 452, 802, 825, 896
Haswell v. Haswell	387, 978, 981, 982	Heather v. Winder	619, 686, 867
Hatch v. Hale	321	Hebblethwaite v. Cartwright	808
— v. Hatch	274	Hedges v. Harpurs	692
— v. Skelton	959, 961	Hedgman, In re	557
Hatton v. Finch	896, 899	Hedley v. Fenwick	152, 221
Hanghton v. Harrison	803, 804	Heelis v. Blain	343
Havergal v. Harrison	801, 910	Hele v. Exeter (Bishop of)	269, 271
Havergill v. Hare	352	Hellawell v. Eastwood	314
Hawes v. Hawes	896	Hellier v. Silcox	11
Hawker v. Hawker	354, 355	— v. Twifodd	109
Hawkin's Trusts, In re	556	Hemdon and Crouche's Case	158
		Henchett v. Kimpson	317
		Henchman v. Att.-Gen.	565, 774, 776
		Henderson v. Constable	644

	PAGE		PAGE
Henderson <i>v.</i> Cross	973	Hilton <i>v.</i> Hilton	491
——— <i>v.</i> Squire.....	35	Hinchcliffe <i>v.</i> Kinnoul (Lord) .	178
Hennessey <i>v.</i> Bray.....	982	——— <i>v.</i> Westwood	907
Henning <i>v.</i> Burnet . 205, 206,	221	Hinchman <i>v.</i> Iles	19
Henshaw <i>v.</i> Atkinson	555	Hinde <i>v.</i> Lyon.....	436
Herbert <i>v.</i> Fream	754	Hinder <i>v.</i> Streeten	1001
——— <i>v.</i> Reid	920	Hindle <i>v.</i> Blades.....	329
Herbert's Trusts, Re	930	Hinds <i>v.</i> Hinds	379
Hereford <i>v.</i> Adams.....	579	Hine <i>v.</i> Reynolds	260
——— (Bishop of) <i>v.</i> Adams	535, 574	Hinton, Ex parte	984
Herlakenden's Case.....	43, 47	——— <i>v.</i> Hinton	730
Herne <i>v.</i> Benbow	110	Hippesley <i>v.</i> Homer	927
Heron <i>v.</i> Stokes	676	Hitchens <i>v.</i> Hitchens.....	69, 360
Herrick <i>v.</i> Franklin 865, 867 <i>add.</i>		Hoad's Case	769
Herring <i>v.</i> Brown	387	Hoare <i>v.</i> Dickinson	218
Hervey <i>v.</i> Hervey 389, 393, 420, 421		——— <i>v.</i> Metropolitan Board of Works	152, 168
——— <i>v.</i> Smith	168, 172, 227	——— <i>v.</i> Osborne 537, 538, 910, 915	
Herz <i>v.</i> Union Bank of London	202	——— <i>v.</i> Wilson	144
Hetherington <i>v.</i> Graham	81	Hoath <i>v.</i> Hoath	823, 849
Hewet <i>v.</i> Ireland	808	Hobbs <i>v.</i> Parsons.....	493, 849
Hewitson <i>v.</i> Todhunter	907	Hobgen <i>v.</i> Neale	888, 896
Hewitt <i>v.</i> Dacre (Lord) 404, 412, 417		Hobson <i>v.</i> Todd	144
Hewlins <i>v.</i> Shippam	168, 171	Hoby <i>v.</i> Hoby.....	68, 83, 735
Hext <i>v.</i> Gill	210	Hockley <i>v.</i> Mawbey 484, 621, 693,	
Heydon (Sir Christopher's) Case	369		753
Heyward <i>v.</i> Cannington	136	Hodder <i>v.</i> Holman	220
Heywood <i>v.</i> Heywood....	508, 734	Hodge <i>v.</i> Att.-Gen.....	789, 790
——— <i>v.</i> Smith	706	Hodges <i>v.</i> Grant	889
Hickman <i>v.</i> Haslewood	726	Hodgeson <i>v.</i> Bussey	863, 865
——— <i>v.</i> Upsall.....	116	Hodgkins <i>v.</i> Thornborough ...	330
Hibbert <i>v.</i> Cooke	87	Hodgkinson <i>v.</i> Ennor	197, 200
Hide <i>v.</i> Thornborough....	213, 215	——— <i>v.</i> Quinn	377
Higginbotham <i>v.</i> Holme. 982, 984		Hodgson, Ex parte.....	982, 984
Higginson <i>v.</i> Kelly	984	——— <i>v.</i> Ambrose	606
Higham <i>v.</i> Rabett	206	——— <i>v.</i> Clarke	936, 941
Hill, Ex parte	982, 984	——— <i>v.</i> Hooper	10
——— In re Roberts..	326	——— <i>v.</i> Merest.....	617
——— <i>v.</i> Carr.....	754	——— <i>v.</i> Rawson	728, 858
——— <i>v.</i> Chapman	804	Hodgson's Trusts, In re..	889, 896
——— <i>v.</i> Cowdery	980	Hodson <i>v.</i> Ball.....	480, 723
——— <i>v.</i> Crook	932, 933	——— <i>v.</i> Carter	1001
——— <i>v.</i> Grange.....	122, 256, 286	Hogan <i>v.</i> Hand	19, 20
——— <i>v.</i> Jones	557	——— <i>v.</i> Jackson ..	717, 719, 726
——— <i>v.</i> London (Bishop of) ..	274	Hogg <i>v.</i> Cook	938
——— <i>v.</i> Nalder	888	Holcome and Evans's Case ..	161
——— <i>v.</i> Pritchard	385	Holcroft <i>v.</i> Heel	181
——— <i>v.</i> Rattey	724	Holden's Estate, Re	759
——— <i>v.</i> Tupper	169, 194	Holden <i>v.</i> Weekes	106, 107
Hilliard <i>v.</i> Fulford.....	856	Holderness (Lady) <i>v.</i> Marquis of Carmarthen.....	69
Hills <i>v.</i> Worley	909	Holdfast <i>d.</i> Cowper <i>v.</i> Marten	724
Hilton <i>v.</i> Giraud.....	560	Holdsworth <i>v.</i> Davenport	561
——— <i>v.</i> Granville (Earl) 137, 139,	211	——— <i>v.</i> Goose	384

	PAGE		PAGE
Hole v. Estoot	382	Horton v. Hall	328
Holford v. Hankinson	187	—— v. Horton	633, 643
Holker v. Porritt	192, 195	—— v. Smith	950, 954
Holland v. Cole	978	Horwood v. Griffith	929
—— v. Hatton	16	Hoskins v. Featherstone	109
—— v. Wood	622, 803	—— v. Robbins	140
Holland's Case	263, 769	—— v. Robins	134, 146
Hollier v. Burne	92	Hoste v. Pratt	524, 805
Holloway v. Clarkson	601	Hough v. May	300
—— v. Webber	483	Hough's Will, Re	356
Holme v. Brunskill	25	Houghton v. Houghton	887
Holmes v. Bellingham	206	Houston v. Hughes	353, 359, 362
—— v. Cradock	834	Hovenden v. Annesley (Lord)	366
—— v. Custance	929	How v. Viguere	1009
—— v. Day	29	Howard v. Candish	83
—— v. Godson	973	—— v. Cavendish	68
—— v. Goring	169, 179, 180	—— v. Harris	743
—— v. Meynel	648, 657, 658	—— v. Howard	910
—— v. Penney	977, 984	—— v. Shaw	13, 14
—— v. Prescott	841	—— v. Wemsley	28
—— v. Seller	170	Howarth v. Mills	933
Holt v. Lindrey	931, 932, 933	Howe v. Dartmouth (Earl of)	96
—— v. Winchester (Bishop of)	262	—— v. Howe	56
Holt's (Thomas) Case	262	Howes v. Herring	846
Homer v. Homer	935	Howlin v. Sheppard	99, 102
Honnor's Trust, In re	571	Howse v. Chapman	527, 538
Honywood v. Foster	758	Howton v. Frearson	178
—— v. Honeywood	108, 111, 116	Huddleston v. Gouldsbury	643
Hood v. Oglander	971	Hudleston v. Whelpdale	93, 95, 96
—— v. Phillips	959, 961	Hudson v. Tabor	217
Hook v. Hook	741	Hudsons, Re	861
Hooker v. Hooker	60, 70	Hughes v. Chatham (Overseers	
Hooley v. Hatton	928	of)	14
Hooper, Ex parte	652, 653, 689	—— v. Ellis	916, 973, 974
—— v. Bourne	153	—— v. Hughes	802, 806
Hope v. Gloucester (Corpora-		—— v. Sayer	683, 693
tion of)	495	—— v. Wells	778
—— v. Liddell	993	Hugo v. Williams	494, 495, 753
—— v. Potter	654	Hulkes v. Barrow	91
Hopewell v. Ackland	720	Hull (Mayor of) v. Horner	181
Hopkins v. Hopkins	473, 494	Hull's Estate, Re	801
—— v. Phillips	555	Hulme v. Hulme	508
Hopkinson v. Ellis	561	—— v. Tenant	85, 985
Horde v. Suffolk (Earl of)	586	Humberston v. Humberston	493, 494
Horlock v. Smith	87	Humberstone v. Stanton	873, 874,
Horn v. Coleman	897		908, 915
Hornby, Re	914	Humble v. Shore	914
Horne v. Barton	658	Humphrey v. Taylenr	402, 406, 910
Horner v. Swann	390	Humphreys v. Harrison	108
Horseman v. Abbey	804	—— v. Howes	873, 915
Horsey (Sir Jerome) v. Hag-		—— v. Humphreys	641, 643
berton	146	Humphries v. Brogden	207, 208
Horsfall, Re	996	—— v. Cousins	198
Horsley v. Chaloner	802	Hungerford v. Hungerford	97

	PAGE		PAGE
Jacombe <i>v.</i> Knight.....	225	Johnson <i>v.</i> Foulds	844
James <i>v.</i> Allen	540, 582	——— <i>v.</i> Harrowby (Lord) ..	562
——— <i>v.</i> Dean	20, 27	——— <i>v.</i> Johnson .. 508, 906, 907,	917
——— <i>v.</i> Hayward	223	——— <i>v.</i> Jones	300
——— <i>v.</i> Plant	175, 230	——— <i>v.</i> Upham.....	324, 326
——— <i>v.</i> Richardson.....	800	——— <i>v.</i> Webster	961
——— <i>v.</i> Shaunon	642, 643	——— <i>v.</i> Woods	562
——— <i>v.</i> Smith	404, 931	——— <i>v.</i> Wyatt....	205, 225, 230
——— <i>v.</i> Wynford (Lord)	476, 837	Johnson's Trusts, In re	862
Jarman <i>v.</i> Vye	689	Johnston <i>v.</i> Swann..	539, 553, 556,
Jarman's Estate, In re	582		561
Jauncey <i>v.</i> Att.-Gen.	562	Johnstone <i>v.</i> Baber..	263, 275, 278
Jeafferson's Trusts, In re	406, 863,	——— <i>v.</i> Hamilton....	563, 565.
	865	Joliffe <i>v.</i> Twyford	87
Jeal <i>v.</i> Tichener	858	Jolliffe <i>v.</i> East.....	878, 896, 899
Jebb <i>v.</i> Tugwell	413	Jolly <i>v.</i> Arbuthnot	16, 326
Jee <i>v.</i> Audley..	439, 448, 457,	Jones's Will, Re.....	972
Jeffereys <i>v.</i> Small	886	Jones <i>d.</i> Perry <i>v.</i> Roe	728, 729
Jefferies <i>v.</i> Alexander	564	——— <i>v.</i> Ashurst	793
——— <i>v.</i> Michell	936	——— <i>v.</i> Badley	564
Jefferson <i>v.</i> Durham (Bishop of)	114	——— <i>v.</i> Carter.....	312
Jeffery <i>v.</i> Bastard	329	——— <i>v.</i> Chapman	10
——— <i>v.</i> De Vitre.....	679, 680	——— <i>v.</i> Clerk	18, 20
——— <i>v.</i> Honeywood....	675, 680	——— <i>v.</i> Cullimore	688
Jeffreys <i>v.</i> Conner	97	——— <i>v.</i> Davies.....	66
Jenkins <i>v.</i> Clinton (Lord)....	616	——— <i>v.</i> Goodchild	775, 784
——— <i>v.</i> Harvey	180	——— <i>v.</i> Griffith	103
——— <i>v.</i> Herries	718	——— <i>v.</i> Hall	889
——— <i>v.</i> Hughes..	616, 618, 718	——— <i>v.</i> Hill.....	110
——— <i>v.</i> Jenkins	357, 721	——— <i>v.</i> Jones ..	79, 92, 94, 95, 96,
——— <i>v.</i> Kemis.....	386		145, 858
——— <i>v.</i> Kemishe	416	——— <i>v.</i> Mackilwain.....	849, 852
——— <i>v.</i> Keymes	754	——— <i>v.</i> Maggs.....	512, 515, 516
Jenner <i>v.</i> Clegg	11	——— <i>v.</i> Marsh	31
——— <i>v.</i> Morgan	301	——— <i>v.</i> Mills	33
——— <i>v.</i> Morris	89	——— <i>v.</i> Morgan..	468, 606, 953, 960
Jennings <i>v.</i> Jennings.....	Add.	——— <i>v.</i> Morley	351
——— <i>v.</i> Looks	856	——— <i>v.</i> Morris.....	300
——— <i>v.</i> Newman	800	——— <i>v.</i> Newman..	919, 923, 936, 937
Jennor <i>v.</i> Hardy	726	——— <i>v.</i> Ogle	310
——— <i>v.</i> Harper	577	——— <i>v.</i> Peacock	585
Jersey (The Earl and Countess of) <i>v.</i> Deane	388	——— <i>v.</i> Phipps	31
Jervis <i>v.</i> Bruton	105	——— <i>v.</i> Price	189
——— <i>v.</i> Wolferstan.....	906	——— <i>v.</i> Randall	645, 899
Jesson <i>v.</i> Wright ..	606, 610, 612,	——— <i>v.</i> Richard	146
	613, 618, 619, 620, 863, 864	——— <i>v.</i> Ricketts	65
Jesus College (Case of)	536	——— <i>v.</i> Robin	132, 133
Jewel's Case	296	——— <i>v.</i> Ryan	689
Joel <i>v.</i> Mills	978	——— <i>v.</i> Say and Sele (Lord)	602, 606
Johnson <i>d.</i> Earl of Anglesea <i>v.</i> Derby (Earl of)	496	——— <i>v.</i> Tapling	235
——— <i>v.</i> Barnes....	131, 140, 147	JONES <i>v.</i> WESTCOMB	869
——— <i>v.</i> Brady	721		870, 872, 874
		——— <i>v.</i> Williams.....	224, 538

	PAGE		PAGE
Jones v. Winwood	380, 381	Kenrick v. Beaudclerk	354, 357
Jordan and Atwood's Case	158, 160	Kensley v. Langham	265, 267, 274
—— v. Adams	613, 615	Kensington (Lord) v. Bouverie	100
—— v. Fortescue	662	Kent v. Steward	464
—— v. Holkham	835	Kenworthy v. Bate	421
—— v. Lowe	617, 866	—— v. Ward	675, 883, 888
—— v. Savage	77	Keogh v. Keogh	959, 961
Jorden v. Atwood	178, 180	Keppill v. Bailey	169
Jory v. Cox	267	Ker v. Dungannon (Lord)	483, 684
Joule v. Jackson	315	Kernaghan v. M'Nally	71
Joy v. Joy	89	Kerr's Trusts, In re	401, 402, 405, 406
Judd v. Judd	476, 492	Kerr v. Kerr	693
Judge v. Lowe	171	—— v. Pawson	149
Jull v. Jacobs	914	Kershaw v. Kershaw	651
		Kerslake v. White	201
		Kevern v. Williams	491, 805
		Kevill v. Davies	306
		Kew v. Rouse	897
		Key v. Key	618, 648, 653, 725, 834
		Kidman v. Kidman	853
		Kilderbee v. Ambrose	967
		Kilvert's Trusts, In re	583, 937
		Kilworth v. Mountashell	99, 102
		Kime v. Welfitt	508
		Kinch v. Ward	609
		King's Leasehold Estates, In	
		re	22, 30
		—— Mortgage, Re	997
		King v. Burchell	618, 863
		—— v. Cotton	450
		—— v. Cullen	804
		—— v. Dacombe	791
		—— v. Denison	992
		—— v. England	326
		—— v. Isaacson	846
		—— v. King	413
		—— v. Melling	388, 606, 616, 622, 752
		—— v. Ringstead	641, 642
		—— v. Withers	728, 729, 857, 858
		—— (The) v. Armagh (Arch-	
		bishop of)	273
		—— v. Canterbury	
		(Archbishop of)	271
		—— v. Hermitage	147
		—— v. Holland	762
		—— v. Mashiter	934
		—— v. Norwich (Bishop	
		of)	268, 277
		—— v. Oundle (Lord of	
		the Manor of)	364
		—— and Queen v. Por-	
		tington	543

K.

Kampf v. Jones	407, 413, 493
Kane, Re	779
—— v. Cosgrave	585
—— v. Reynolds	785
Kavanagh v. Coal Mining Co.	170
—— v. Morland	417, 619, 845
Kay v. Oxley	175
Kearney v. Ryan	27
Kearsley v. Woodcock	977, 978
Keating v. Keating	693
Keech v. Hall	16, 29
—— v. Sandford	93, 367
Keefe v. Kirby	358
Keen v. Priest	318, 329
Keene v. Dickson	835
Keiley v. Fowler	409
Keiller's Estate, In re	309
Keily v. Monck	849
Kekewich v. Marker	113
Kelk v. Pearson	173, 202, 225, 226
Kell v. Charmer	934
Kellett v. Kellett	407, 907, 915
Kelly v. Hammond	928, 931
—— v. Patterson	25
—— v. Webber	104
Kelsack v. Nicholson	90
Kelsey v. Kelsey	294
Kemp v. Davy	858
Kempson v. Butler	214
Kendal v. Micfeild	51
Kendall v. Granger	540, 583
Kenna v. Nugent	35
Kennedy v. Daly	98, 102
—— v. Sedgwick	653
Kennerley v. Kennerley	403
Kenney v. May	325

	PAGE		PAGE
King v. Stafford (Marquis of)	269, 652	Laker v. Hordern	931, 932
— v. Warkworth	136	Lamb v. Archer	346
— v. Willes	790	— v. Brewster	<i>Add.</i>
— v. Winton (Bishop of)	273	— v. Walker	208
Kingsbury v. Collins	55	Lambert v. McDonnell	28
Kingsford v. Ball	890	Lambeth Charities, In re	555, 579
Kingsmill v. Millard	150, 151	Lampen v. Clowbery	821, 823, 845
Kinloch v. Nevile	188	Lampet's Case	78, 436, 776
Kino v. Rudkin	225, 226	Lamphier v. Buck	871, 889
Kinsella v. Caffrey	655	Lampley v. Blower	680, 686, 685
Kirby v. Fowler	450	Lamplugh v. Lamplugh	342
— v. Harding	322	Lancaster v. Eve	168
— v. Sadgrove	139	Lane v. Dixon	168, 314
Kireudbright v. Kireudbright	280	— v. Goudge	849
Kirkbank v. Hudson	554, 556	— v. Hone	220
Kirkham v. Smith	953, 957	— v. Pannell	605
Kirtland v. Pounsett	13	— v. Stone	220
Kirwan v. Kennedy	99, 102	Lanesborough (Lady) v. Fox	468
Kitchin v. Calvert	246, 279, 280	Lanfranchi v. Mackenzie	202
Knapp v. London Chatham and Dover Railway Co.	229	Lang v. Pugh	848
— v. Williams	527, 529, 559	Langdale (Lady) v. Briggs	90
Knapping v. Tomlinson	476	Langford v. Angur	992
Knight v. Boughton	305	— v. Gowland	581
— v. Cameron	846	— v. Pitt	729
— v. Ellis	409, 495, 866, 867	Langham v. Sandford	941
— v. Frampton	71	Langham's Trusts, In re	560
— v. Gould	914	— Will, In the Matter of	560
— v. Knight	851, 935, 985	Langley v. Baldwin	648, 653
— v. Mosely	106, 107	— v. Hammond	175
— v. Robinson	997	Langslow v. Langslow	414, 666
— v. Selby	723	Langston v. Blackmore	412
— v. Woore	205	— v. Langston	927
Knollys v. Shepherd	1001	Lansdowne v. Lansdowne	116
Knox v. Knox	856	Lantony's (Prior of) Case	160
Koostra v. Lucas	175	Lantsbery v. Collier	385, 488
Krehl v. Burrell	226, <i>Add.</i>	Large's Case	972
Kynnaird v. Leslie	736, 786	Larkins v. Larkins	910
		Lascelles v. Onslow (Lord)	141
		Lashbrook v. Cock	896
		Lassence v. Tierney	407
		Lathan v. Atwood	103
		Laverick's Estate, In re	898
		Law v. Thompson	847
		— v. Thorpe	768
		Lawrence v. Dodwell	927
		— v. Jenkins	217
		— v. Maggs	91
		— v. Obee	231
		Lawson v. Langley	189
		Lawton Estates, In re	307
		Lawton v. Lawton	105
		Layton v. Feild	21
		— v. Hurry	324

L.

Lacey v. Hill	79, 80
Lachlan v. Reynolds	465
Lacy v. Anderson	77
Ladd v. London City	574
— v. Widdows	259
Lade v. Holford	441, 442, 488, 971
Ladyman v. Grave	185, 186, 188
Laing v. Whaley	197
Laird v. Birkenhead Company	171
Lake v. Craddock	886, 891
— v. Currie	935
— v. Plaxton	140

	PAGE		PAGE
Leach v. Leach	492, 801, 908	Leving's (Sir W.) Case	312
— v. Trollope	89	Lewen v. Dodd	896
Leadbeater v. Cross	837	Lewes' Trust, In re	116
Leader v. Homewood	35	Lewes v. Lewes	508
Leak v. Coventry (Bishop of)	278	Lewin v. Cox	900
— v. Macdowall	888, 889, 893	Lewis d. Ormond v. Waters	652, 718, 888
Leake v. Robinson	453, 475, 477, 490, 492, 801, 845, 852	— v. Allenby	557
Lear v. Leggett	980	— v. Freke	422
Leathes v. Leathes	88, 89	— v. Hopkins	862, 867
Leathley v. Trench	308	— v. Lane	364
Leceire v. Beaudrey	384	— v. Lewellin	920
Leconfield (Lord) v. Dixon	152	— v. Matthews	994
— v. Lonsdale (Lord)	183	— v. Puxley	616, 753
Ledsome v. Hickman	915	— v. Rees	361
Lee's Case	683	— v. Smith	332
Lee v. Busk	655	— v. Templer	468
— v. Holding	382	— v. Waters	835
— v. Pain	913, 934, 936, 939	Ley v. Peter	12
— v. Smith	29, 319	Liddard v. Liddard	887
Leech v. Schweder	169, 170	Liford's Case	43, 105, 177
Leeds (Duke of) v. Amherst (Earl)	116	Liggins v. Inge	172, 231
— v. Munday	988	Lightburne v. Gill	973
Leeds v. Cheetham	332	Lightfoot v. Burstall	914
Leeming v. Sherratt	654, 854, 855	Liley v. Hey	536, 540
Lees v. Mosley	617, 619	Lilford's Case	257
Letfley v. Mills	298	Lilford (Lord) v. Att.-Gen.	759
Legatt v. Sewell	609	Lill v. Lill	642, 645, 804, 898
Lehain v. Philpott	312, 328	Limbrey v. Gurr	546
Leicester's (Earl of) Case	388	Limerick & Ennis Railw. Co., In re	759
Leicester v. Foxcroft	563	Lincoln's (Bishop of) Case	273
Leigh's Estate, In re	87	Lincoln (Bp. of) v. Wolferstan	278
Leigh v. Ashburton (Lord)	384	— (Countess of) v. New-castle (Duke of)	448, 493
— v. Byron	930	Lindsay, Re	668
— v. Leigh	913	— v. Wicklow (Earl of)	309, 956, 957, 960
— v. Mosley	889	Lindsell v. Thacker	994
— v. Winter	389	Line v. Hall	494
Leighton v. Theed	21	Linehan v. Deeble	185
Lempster (Lord) v. Pomfret (Lord)	89	Lingen, Re	58
Lenden v. Blackmore	678	Lingwood v. Gyde	149
Le Neve v. Le Neve	366	— v. Stowmarket Co.	216
Leniel v. Harslop	146	Linley v. Taylor	560
Lenox v. Lenox	834	Lisburne (Earl of) v. Davies	150
Leonard v. Sussex (Earl of)	607, 624	Lisle v. Gray	614
Lepine v. Bean	931, 933	Lister v. Bradley	846, 852
— v. Ferard	688	Little v. Wingfield	133
Le Roy v. Priest	271	Littledale v. Thompson	Add.
Lester v. Garland	984	Littleton's (Mr.) Case	595
Lethieulier v. Tracy	604, 649	— (Sir Thomas) Case	992
Lett v. Randall	480, 492	I littlewood v. Pattison	97
LEVENTHORPE v. ASHIE	861	Livesey v. Livesey	846, 849
—	650, 748, 861		

	PAGE
Llewellyn <i>v.</i> Rous	305, 306
Lloyd <i>v.</i> Carew 347, 437, 444, 452,	454, 458, 461, 601
— <i>v.</i> Davies	321
— <i>v.</i> Jackson	721, 725, 727
— <i>v.</i> Johnes	54
— <i>v.</i> Lloyd	71, 405, 538,
	855, 981
— <i>v.</i> Powis (Earl)	147, 152
Lock <i>v.</i> De Burgh	305
— <i>v.</i> Lock	91
Locke <i>v.</i> Lamb 804, 805, 845, 851	
— <i>v.</i> Matthews	10, 19
— <i>v.</i> Southwood	733
Locker <i>v.</i> Bradley	803
Lockyer <i>v.</i> Savage	978, 984
Loddington <i>v.</i> Kime	618
Loftus <i>v.</i> Swift	99
Lomas <i>v.</i> Wright	873
Lomax <i>v.</i> Ripley	564
Lombe <i>v.</i> Stoughton	507
Londesborough (Lord) <i>v.</i> Somerville	302
London's (Mayor of) Case	536
— (Bishop of) Case	147
London (Bishop of) <i>v.</i> Ffytche	281
— <i>v.</i> Wolfers-	
stan	248
— (Mayor of) <i>v.</i> The Pew-	
terers' Company	185
— (University of) <i>v.</i> Yar-	
row	539, 557, 567
London Dock Act, In re	545
London & North Western Rail-	
way Co. <i>v.</i> Ackroyd	211
— <i>v.</i> West	25
Long <i>v.</i> Blackall	440, 448, 550,
	451, 456, 457, 462, 501
— <i>v.</i> Buckridge	341
— <i>v.</i> Laming	613
— <i>v.</i> Long	67, 421
— <i>v.</i> Myles	730
— <i>v.</i> Rankin	383
— <i>v.</i> Storie	267
— <i>v.</i> Watkinson	907
Longdon <i>v.</i> Simson	506, 509
Longhead <i>v.</i> Phelps	490
Longstaff <i>v.</i> Rennison	556, 558
Lord <i>v.</i> Bunn	976, 977, 978
— <i>v.</i> Sidney (Commissioners	
for City of)	192
Loring <i>v.</i> Thomas	808
Loscombe <i>v.</i> Winttingham 538, 578,	
	583

	PAGE
Love v. L'Estrange	823, 830, 849, 852
— v. Wyndham	437, 683
Loveacres d. Mudge v. Blight	725, 727, 896
Lovell v. Smith	233
Lovell's (Sir Salathiel) Case.	790
Low v. Burron	54, 600
Lowe v. Carpenter.	187, 191
— v. Davies	614
Lowndes v. Norton.	112
Lowry's Will, In re	1002
Lowther v. Condon.	858
Lucan v. Carline	847
Lucas v. Brandreth	888
— v. Goldsmid	896
— v. Jones	555, 559
— v. Lucas	346
— v. Nockells.	321
Luckraft v. Pridham	569
Luddington v. Kime	437
Ludlow v. Bunbury	972
Lundy Granite Company, In re; Ex parte Heaven	318, 327
Luneham's Estate, In re	971
Lurting v. Conn	109
Lushington v. Boldero	116
Luttrell's Case	134, 163, 165, 166, 192, 202, 231, 236
Luxford v. Cheeke	835, 836
Lydecott v. Willows.	720
Lyddon v. Ellison	493
Lyme's Case	890
Lynch v. Nelson	54
Lyon v. Coward	889
— v. Fishmongers' Co.	195
— v. Mitchell	865
— v. Weldon	326
Lyons v. East India Company	585
— v. Elliott	315
— (Mayor of) v. Adv.-Gen. of Bengal	573
— (The Mayor of) v. The East India Company	566
Lysaght v. Edwards	1000, 1001
— v. Lysaght	95
Lyster v. Dolland	886
— v. Mahony	71
Lytton v. Lytton.	468, 687
.M.	
MacAndrew v. Gallagher	55
Macaree v. Tall	72

	PAGE		PAGE
M'Carthy v. M'Carthy	873	Mair v. Quilter	661, 845
M'Clenahan v. Bankhead ..	53, 54	Maitland v. Adair	905
M'Clintock v. Irvine	54	—— v. Charlie	653
M'Dermott v. Balfe	53	Major v. Park Lane Company	215
—— v. Wallace	645, 898	Makings v. Makings	97, 99
Macdonald v. Bryce	507, 512	Malcolm v. O'Callaghan	852
—— v. Walker ..	1006, 1007	—— v. Martin	898
McDonald v. McDonald ..	407, 563	—— v. Taylor	616, 651, 654
McDonnell v. Jebb	887	Malcomson v. O'Dea	133
—— v. Pope	28	Malene v. Harris	171
M'Dowell v. Bergin	791	Man v. Man	910
McEnally v. Wetherall	689	—— v. Ricketts	935
Macey v. Metropolitan Board of Works	229	Manchester, Sheffield, &c., Rail- way Company v. Workson Board of Health	197, 217
MacFadden v. Jenkyns	366	Manchester and Stockport Rail- way Company, Re	1001
M'Gregor v. M'Gregor ..	883, 889	Mandeville v. Lackey	614, 617
Machell v. Weeding	617, 648	Manfield v. Dugard	829, 836
Machil v. Clark	709	Mann v. Burlingham	554, 558
Mackaller v. Todderick	248	—— v. Fuller	663
Mackay, Ex parte	983	—— v. Lovejoy	24
McKechmie v. Vaughan	941	—— v. Thompson	693, 805
Mackell v. Winter ..	661, 828, 846	Mannall v. Fisher	133
McKenna v. Eager	622, 867	Manneton v. Trevilian	129
Mackenzie v. Bradbury ..	663, 664	Manning's (Matthew) Case	436, 437
—— v. Gordon	962	Manning v. Andrews	792
—— v. Robinson	267	—— v. Chambers	981
Mackie v. Scottish Widows' Society	202	—— v. Herbert	858
Mackinnon v. Peach ..	873, 910, 915	—— v. Moore	618
—— v. Sewell	873	—— v. Phelps	334
Mackintosh v. Townsend	567	—— v. Taylor	726
Mackreth v. Symmons	366	—— v. Wasdale	169
Mackworth v. Hinxman ..	478, 483	Mannox v. Greener	726, 728
M'Lachlan v. Tait	844	Mansell v. Grove	686
Macleay, In re	971, 972	Mantell v. Mantell	738
M'Neale, In re	54	Mapleton v. Mapleton	403, 423
Macnolty v. Fitzherbert	87	Marchant v. Cragg	901
Macpherson v. Stewart	506	Markby, In re	306
Maddison v. Chapman ..	834, 835, 850	Markey v. Coote	13
Madden d. Baker v. White ..	29	Marks v. Marks	438, 444, 452, 454, 458, 729
Maddox v. Staines	438, 654	Marlborough (Duke of) v. Go- delphin ..	51, 439, 463, 906
Maddy v. Hale	92	—— v. St. John	106, 107, 109
Maden v. Taylor	657, 723	Marlow v. Smith	987, 991, 992
Magor v. Chadwick	199	Marryat v. Townly ..	650, 887, 888, 896
Maguire, In re	581, 583	Marsh v. Att.-Gen.	554, 560
—— v. Gratton	225	—— v. Wells	110
—— v. Scully	661	Marshall, Ex parte	994
Mahaffy v. Rooney	688	—— v. Crowther	98
Maher v. Maher	845	—— v. Exeter (Bishop of)	269
Mahon's Estate, In re	53		
Mahon v. Savage	536		
Mahony v. Tynte	971		
Mainwaring v. Baxter	463		
—— v. Beever	805, 807		

	PAGE		PAGE
Marshall <i>v.</i> Grime	609, 618	May <i>v.</i> Wood ..	823, 824, 825, 826, 828, 829, 831, 845
——— <i>v.</i> Hill	653, 722	Maybank <i>v.</i> Brooks	905, 909
——— <i>v.</i> Holloway	442, 506, 509	Mayn <i>v.</i> Mayn	887, 888
——— <i>v.</i> Smith	81	Maynye's Case	80
Marshe and Smith's Case	258	Meadows <i>v.</i> Parry	871
Martelli <i>v.</i> Holloway	483	Meaghan, In re	982, 984
Martin <i>d.</i> Tregonwell <i>v.</i> Stra- chan	745, 747	Measure <i>v.</i> Gee	606, 609
——— <i>d.</i> Weston <i>v.</i> Mowlin	1010	Medley <i>v.</i> Horton	963
——— <i>v.</i> Goble	202, 234	Medlicot <i>v.</i> Bowes	851
——— <i>v.</i> Headon ..	203, 227, 235	Medway Company <i>v.</i> Romney (Earl of)	192
——— <i>v.</i> Laverton ..	994, 995, 1001	Medworth <i>v.</i> Pope	933
——— <i>v.</i> Long	692	Meeds <i>v.</i> Wood	835
——— <i>v.</i> M'Causland	653, 725	Megit <i>v.</i> Johnson	784
——— <i>v.</i> Margham ..	506, 578, 980	Meller <i>v.</i> Stanley	862
——— <i>v.</i> Martin	265, 274, 275	Mellick <i>v.</i> The President, &c. of the Asylum	538
——— <i>v.</i> Smith	22, 24, 25	Melling <i>v.</i> Leak	15, 17, 18, 20
——— <i>v.</i> Swannell ..	405, 693, 752	Mellish <i>v.</i> Mellish	616
——— <i>v.</i> Welstead	556	Mellor <i>v.</i> Spateman	131
——— <i>v.</i> Wilson	912	——— <i>v.</i> Watkins	27
Martineau <i>v.</i> Rogers	843	Mence <i>v.</i> Bagster	883, 888
Martyn <i>v.</i> Lawrence	201	Mendham <i>v.</i> Williams	858
Mason's Will, Re	917	Menvil's Case	80, 81
Mason <i>v.</i> Att.-Gen. of Jamaica ..	795	Mercer's Co. <i>v.</i> Att.-Gen.	574
——— <i>v.</i> Bateson	933, 941	Mercer <i>v.</i> Woodgate	219
——— <i>v.</i> Clarke	677, 679, 888	Merceron's Trusts, In re	654
——— <i>v.</i> Hill	192, 193	Merchant Taylors Company <i>v.</i> Att.-Gen.	574
——— <i>v.</i> Newland	324	Meredith's Trusts, In re	406
——— <i>v.</i> Shrewsbury &c. Rail- way Company	182, 199	Meredith <i>v.</i> Farr	931
Massenburgh <i>v.</i> Ash	437, 450, 452	Merest <i>v.</i> James	619
Massey <i>v.</i> Goyder	215	Merlin <i>v.</i> Blagrove	476
——— <i>v.</i> Hudson	693	Merrill <i>v.</i> Rumsey	603
Massy <i>v.</i> O'Dell	496	Merritt <i>v.</i> Frame	332
Master <i>v.</i> De Croismar	783	Merry <i>v.</i> Hill	845, 846, 850
——— <i>v.</i> Hansard	174	Merson <i>v.</i> Blackmore	722
Masters <i>v.</i> Farris	329	Messena <i>v.</i> Carr	422
——— <i>v.</i> Masters ..	538, 934, 941	Messenger <i>v.</i> Armstrong	11
Mather <i>v.</i> Scott	555, 570	Mestaer <i>v.</i> Gillespie	928
——— <i>v.</i> Thomas	997	Metcalfe <i>v.</i> Westaway	220
Mathews <i>v.</i> Keble	507, 512, 515, 517	Metham <i>v.</i> Devonshire (Duke of)	931, 934
Mathias <i>v.</i> Mathias	87	Metropolitan Association <i>v.</i> Petch	224
——— <i>v.</i> Mesnard	315	Metropolitan Board of Works <i>v.</i> McCarthy	195
Matthews <i>v.</i> Gardiner	720	——— <i>v.</i> Metropo- politan Railway Company ..	213
——— <i>v.</i> Maude	663	Mette's Estate, In re	97
——— <i>v.</i> Venables	544	Meure <i>v.</i> Meure	683
——— <i>v.</i> Windross ..	720, 721	Meynell <i>v.</i> Massey	95
Matts <i>v.</i> Hawkins	217	Meyrick <i>v.</i> Lawes	58
Maundrell <i>v.</i> Maundrell ..	70, 72, 392		
Maunsell, Ex parte	759		
Mawby, Ex parte	266		
Maxwell <i>v.</i> Maxwell	908		
May <i>v.</i> Hook	891		
——— <i>v.</i> Street	773		

	PAGE		PAGE
Meyricke Fund (The), In re . . .	587	Mogg v. Mogg	477, 807
Michel's Trust, In re	542, 543	Moggridge v. Thackwell . . .	531, 537
Middleton v. Cater	565, 568	572, 573, 577, 585, 795	
— v. Clitherow	537, 558	Mold v. Wheatecroft	171
— v. Losh	515	Mole v. Smith	72
— v. Messenger	803	Molineaux's (Lord) Case . . .	770
— v. Spicer	554, 565, 784	Mollett v. Brayne	27
— v. Swain	723, 726	Money's Trust, In re	92, 97
Midgley v. Richmond	221	Monkhouse v. Holme	830, 851
Midland Counties Railway		Monkton v. Att.-Gen.	785
Company v. Westcomb	1001	Monmouthshire Canal Com-	
— Rail. Co. v. Checkley	211	pany (The) v. Harford	183, 188
Mildmay's (Sir Anthony) Case . .	60,	Montague v. Beaulieu	862
463, 639, 745, 746, 970, 972		Montefiore v. Behrens	985
Miles v. Dyer	509	— v. Enthoven	979
— v. Furber	315	Montford v. Cadogan (Lord) . .	91, 93
— v. Harrison	562	Montgomerie v. Woodley	491
— v. Knight	390	Montgomery v. Montgomery . .	606,
— v. Murphy	29	613, 619, 622, 726	
Mill v. Mill	680	Monypenny v. Dering	409, 466, 473,
— v. New Forest (Commis-		474, 490, 493, 494, 653, 656	
sioners of)	188	— v. Monypenny	328
Millard v. Bailey	935	Moody v. King	70
Miller v. Faure	873, 916	Moone v. Heaseman	721, 722, 725
— v. Green	314	Moor v. Raisbeck	1010
— v. Huddleston	101	Moor's Case	751
— v. Miller	108, 109	Moore's Settlement, Re	896
— v. Seagrave	615	Moore v. Cleghorn	723, 898
— v. Travers	920, 924, 935, 941	— v. Hall	202
— v. Warren	915	— v. Moore	749
Milliner v. Robinson	616	— v. Parker	601
Mills v. Capel	759	— v. Plymouth (Earl of)	291
— v. Farmer	572	— v. Rawson	201, 231, 232,
— v. Goff	31	233	
— v. Seward	613	— v. Webb	189, 197
— v. Trumper	306	— v. Webster	61
Milner v. Milner	663	Mordant (Lord) v. Peterbo-	
Milroy v. Milroy	492, 837, 850	rough (Earl of)	379
Milsington (Lord) v. Mulgrave		Moreland v. Richardson	168, 171
(Earl of)	91	Morewood v. Wilkes	793
Milward's Estate, In re	114	Morgan d. Surman v. Surman . .	422
Miner v. Gilmour	192, 193, 222	— Ex parte	1010
Minet v. Morgan	143, 144	— v. Britton	883
Minshull v. Minshull	609	— v. Davies	28
Minter v. Wraith	490	— v. Gardiner	858
Mirehouse v. Rennell	262	— v. Gronow	413, 487
Mitchell's Estate, In re; Mit-		— v. Morgan	61, 507, 518,
chell v. Moberley	561	719, 751, 759, 848, 851	
Mitford v. Reynolds	538, 539, 566,	— v. Morris	572
582, 585		Moriarty v. Grey	54
Mocatta v. Murgatroyd	964	— v. Martin	352
Moffatt v. Burnie	645, 801, 900	— v. Moriarty	413
MOFFATT v. HAMMOND	943	Morice v. Durham (Bishop of) . .	540,
Mogg v. Hodges	561, 568	582, 583	

	PAGE
Morley's Will, In re	994, 995
Morley, In re	102
MORLEY v. BIRD	876
—	605, 910
— v. Morley	956, 957
Morris d. Andrews v. Le Gay	609
— v. Edgington 170, 179,	180
— v. Glyn	561
— v. Hodges	92
— v. Lloyd	721, 722
— v. Morris	55, 109, 656, 692, 694
— v. Ward	606
Morrison's Case	63
Morrison v. Chadwick	311, 332
Morrough v. Dufferin (Lord)	721
Morse v. Martin	486
— v. Morse	678
— v. Ormonde (Lord)	470
Mortimer v. Hartley	751
— v. Ireland	1004, 1007
— v. Watts	91, 94
— v. West	494, 928
Mortlock's Trusts, In re	972, 973
Mortlock v. Bullen	392, 393
Morton v. Woods	16
Moseley's Trusts, In re	476
Moseley v. Bland	205
Moss v. Gallimore	18, 300
Mostyn v. Brunton	850
— v. Mostyn	926, 941
Mottram, Re	837
Mounsey v. Ismay	189
Mounson v. Redshaw	330
Mower v. Orr	805, 917
Mowlem, In re	739
Moyle's Estate, In re	674
Moyse v. Gyles	346, 891
Muckleston v. Brown	563
Muggeridge's Trust, Re	978, 979, 981
Muggleton v. Barnett	738, 742
Mulville v. Fallon	233
Mundy v. Howe (Earl)	524
— v. Mundy	84
Murchie v. Black	173, 207, 208, 236
Murgatroyd v. Robinson	189, 197
Murkin v. Phillipson	853, 858
Murland v. Perry	<i>Add.</i>
Murphy, In re	982, 983
— v. Abraham	982
— v. Ford	18, 20
Murray v. Addenbroke	491, 689

	PAGE
Murray v. Jones	871, 874
— v. Tancred	845
— v. Thorniley	343
Murthwaite v. Jenkinson	354
Muschamp v. Bluet	972
Musgrave v. Emmerson	294
— v. Forster	152
— v. Inclosure Commissioners	152
Muskett v. Eaton	841
Muspratt v. Gregory	315
Mutton's Case	346
Myers v. Perigal	560

N.

Nab v. Nab	366
Nadin, Ex parte	30
Nairn v. Majoribanks	87
Nandick v. Wilkes	661
Nanfan v. Legh	751
Nanson v. Barnes	740
Nargatt v. Nias	329
Nash v. Coates	669
— v. Coombes	142, 153
— v. Lucas	322
— v. Morley	535, 537, 539, 540, 583
— v. Nash	609
— v. Palmer	332
— v. Preston	71
National Guaranteed Manure Co. v. Donald	182, 200, 236
National and Provincial Plate Glass Insurance Company v. Prudential Assurance Company	226, 227, 228, 236
Neale v. Mackenzie	332
Neame v. Moorsom	961
Neatherway v. Fry	403
Neighbour v. Thurlow	655
Nelson's Case	146
Nelson v. Agnew	758
— v. Callow	488
— v. Hopkins	935
Neo v. Neo	466, 495, 496
Nepean v. Doe d. Knight	9
Nethersole v. School for the Indigent Blind	569
Netterville (Lessee of Lord) v. Marshall	416
Nettleton v. Stephenson	510, 511

	PAGE
Oland <i>v.</i> Bardwick	104
— <i>v.</i> Burdwick	22, 104
Oldershaw <i>v.</i> Holt	307
Oldham <i>v.</i> Hubbard	302, 307
— <i>v.</i> Litchfield ..	927, 928
— <i>v.</i> Oldham	982
— <i>v.</i> Pickering	52
Oliphant <i>v.</i> Hendrie	567
Olivant <i>v.</i> Wright	687
Oliver <i>v.</i> Richardson	81
— <i>v.</i> White	888
Olney <i>v.</i> Bates	916
Ommanney <i>v.</i> Butcher ..	540, 572, 583
O'Neill <i>v.</i> Allen	133
— <i>v.</i> Lucas	509, 512
— <i>v.</i> Maguire	133
— <i>v.</i> Montgomery	694
Ongley <i>v.</i> Chambers	935
Onley <i>v.</i> Gardiner ..	187, 188, 191
Onslow <i>v.</i> South	845
— <i>v.</i> Wallis	775
Oppenheim <i>v.</i> Henry ..	805, 851
Opperman <i>v.</i> Smith	319
Orme's Case	343
Orme, In re	845, 849
Ormerod <i>v.</i> Hardman	393
— <i>v.</i> Riley	875
Ormonde (Marquis of) <i>v.</i> Kyn- nersley	116
Orr-Ewing <i>v.</i> Colquhoun	193
Osborn <i>v.</i> Bellman	875
Osman <i>v.</i> Sheafe	346
Ossulston's (Lord) Case	751
Otter <i>v.</i> Vaux	965
Ousby <i>v.</i> Harvey	862
Ouseley <i>v.</i> Anstruther	663
Overhill's Trust, Re ..	928, 930, 931
Owen's Trusts, In re	679, 680
Owen, In re	<i>Add.</i>
— <i>v.</i> Barrow	300
— <i>v.</i> Bryant	932
— <i>v.</i> Davies	194
— <i>v.</i> De Beauvoir	333
— <i>v.</i> Owen	910
— <i>v.</i> Penny	888
Oxford (University of) <i>v.</i> Clif- ton	752

P.

Packer v. Gibbins	333
—— v. Scott	476, 477

	PAGE
Packer v. Welstead.	178, 179, 180
Packington's Case	115
Packman and Moss, In re	993
Page's Case.	781
Page v. Hayward	347
— v. More	11
— v. Page.	910, 915
— v. Soper	601
— v. Way	977
Paget's Case	43
Paget v. Gee	302, 303
Paice v. Canterbury (Arch- bishop of).	553, 573, 585, 719
Pain v. Benson	911
Paine's Case	22, 61, 65, 70
Paine v. Hall	564
— v. Ryder	152
— v. Stratton	863
— v. Wagner	678, 901
Palk v. Skinner	191
Palmer v. Fleshees	173
— v. Flessier	173
— v. Fletcher	173
— v. Holford	464, 490, 492
— v. Kebblethwaite	193
— v. Persse	193
— v. Wheeler	403
Palsgrave v. Atkinson	417, 488
Pannell v. Mill	170, 295
Papillon v. Brunton	32
— v. Voice	89, 606, 624, 753
Paradine v. Jane	332
Parfitt v. Hember	494
Paris v. Miller	724, 726
Parke, Ex parte; In re Potter	318
Parker's Case	141
Parker (Jane) In the Goods of	917
— v. Birks	689, 719
— v. Carter	17, 63, 64
— v. Clarke	622
— v. Gossage	979
— v. Hodgson	856, 857, 860
— v. Mitchell	187, 190
— v. Nickson	663, 721
— v. Parker	416
— v. Smith	225
— v. Sowerby	77, 78, 851, 855
— v. Taswell	22
— v. Thacker	469
— v. Tootal	648
Parkin v. Knight	752, 837, 865
Parnham's Trusts, In re	981
Parr's Trusts, Re	843
Parr v. Parr	851

	PAGE		PAGE
Parr v. Swindels	648, 654	Peel v. Catlow	617
Parrott v. Anderson	300	Peirce v. Locke	665
Parry (Ann), In re	779	Peiton v. Banks	726
— v. Brown	416	Peixoto v. Bank of England..	970
— v. Duncan	323	Pelham v. Gregory	867
— v. Wright	959, 962, 963	Pell's Trusts, Re	849
Parsons v. Coke	865	Pells v. Brown	436, 464, 638, 639
— v. Gingell	315	Pelly v. Maddin	342
— v. Justice	803, 807, 808	Pember v. Knighton (Inhabit-	
— v. Lanoe	927	ants of)	537
— v. Parsons	387, 834, 920, 982	Pembroke's (Earl of) Case ..	134
Partriche v. Powlet	110, 889, 891	Penne v. Peacock	380
Partridge v. Scott	213	Pennefather v. Pennefather ..	76
Paterson v. Rolland	898	Pennell v. Dysart (Earl of) ..	90
Patrick v. Stubbs	140, 141	Penney, Re	195
Pattenden v. Hobson	864, 865	Pennington v. Brinsop Hall	
Pattison v. Pattison	803	Coal Co.	228
Patten v. Randall	726	— v. Buckley	537
Paul v. Children	931	Pennock v. Pennock	974
Pauncefote's Case	792	Penny v. Allen	759
Pawlet v. Doggett	692	— v. Clarke	889
Pawlett v. Att.-Gen.	790, 791	Penrhyn (Lord) v. Hughes ..	100, 102
PAWLETT (LADY) v. PAWLETT		Penruddock's Case	224
(LORD)	816	Penstred v. Payer	537
—	832, 856	Penticost v. Ley	935
Pawsey v. Edgar	858	Penwarden v. Ching	181, 201
Paylor v. Pegg	646	Pepper v. Dixon	78
Payne, In re	844, 852, 978	Peppercorn v. Hofman	324
— v. Brigham	178	Perceval v. Perceval	473, 478
— v. Sheddon	187	Perkins v. Baynton	877, 878, 887
— v. Webb	896	— v. Bradley	792
Peachy v. Somerset (Duke of)	778	— v. Micklethwaite	911
Peacock v. Eastland	341, 344, 758	Perrin v. Blake	600, 606, 607, 614
— v. Purvis	316, 317	Perring v. Trail	569
Pearce v. Carrington	801	Perry v. Fitzhowe	145, 224
— v. Davis	300	— v. Merritt	973
— v. Edmeades	660, 898	— v. Shipway	12
— v. Loman	857, 860	— v. Woods	896, 898
Peard v. Kekewich	466, 485, 720	Pery v. White	657, 658, 660, 887
Pearman v. Pearman	849, 852	Peter v. Daniel	167, 217, 218
Pearsall v. Simpson	834	Peters v. Masham	416, 417
Pearse v. Reeve	437	— v. Morehead	417
Pearson v. Dolman	849, 850, 852	Petre v. Petre	89
— v. Lane	422	Pettitward v. Prescott	724
— v. Spencer	175, 179, 180	Peyton v. Hughes	805
— v. Stephen	865	— v. Lambert	651, 688, 689
Peat v. Chapman	896, 910	— v. London (Mayor of) ..	214
— v. Powell	646, 723	Pfleger, In re	97
Pedley v. Dodds	929	Phené's Trusts, In re	116, 896
Peek's Trusts, In re	849	Phené v. Popplewell	28
Peel's (Sir Robert) School at		Phesant v. Salmon	120
Tamworth, In re; Ex parte		Pheysey v. Vicary	167, 175, 179,
Charity Commissioners	583	—	180
Peel, In the goods of	929	Phibbs v. Cooper	927

	PAGE		PAGE
Philanthropic Society (The) v. Kemp	562	Pindar v. Ainsley	332
Philbrick, Re	421	—— v. Wadsworth	143
Philipps v. Allen	724	Pinhorn v. Souster	15, 18, 20
—— v. Chamberlaine	663	Pinnington v. Galland	177, 178, 179, 180
Phillips' Trust	97	Pistor v. Cater	25
Phillips v. Barker	941	Pitt v. Jackson	61, 409, 410, 494, 602
—— v. Barlow	112	—— v. Pitt	956, 961
—— v. Brydon	422	—— v. Snowdon	321
—— v. Gutteridge	963	Plant v. James	175
—— v. Henson	316	Plasterers' Company v. Parish	
—— v. Hudson	143, 144	Clerks' Company	186
—— v. James	661	Plate v. St. John's College	536
—— v. Phillips	68, 886, 896, 905	Platt v. Powles	58
—— v. Sargent	97	Playfair v. Cooper	101
—— v. Smith	108	Playford v. Hoare	358
—— v. Treeby	171, 223	Playre v. Crouch	730
Philpott v. St. George's Hospital	872	Playters v. Abbott	93, 96
Phipard v. Mansfield	657, 658, 660	Pleasant d. Hayton v. Benson	32
Phipps v. Ackers	839, 840	Plenty v. West	354, 356
—— v. Ennismore (Lord)	982	Pleydell v. Pleydell	683
—— v. Kelynge	507	Plumer v. Briscoe	329
—— v. Mulgrave (Lord)	867	Plummer v. Whiteley	305
—— v. Williams	839	Plunket v. Holmes	601
Phipson v. Turner	486	Plunkett v. Lewis	89
Phitton's Case	371, 386	—— v. Reilly	57
Picken v. Matthews	805, <i>Add.</i>	Poad v. Watson	354
Pickering v. Rudd	200	Pochin v. Duncombe	152
—— v. Stamford (Lord)	527, 905, 906, 906	Pocock v. Att.-Gen.	573
—— v. Vowles	992	—— v. Lincoln (Bishop of)	274, 720, 929
Pickersgill v. Grey	53, 56	Podger's (Margaret) Case	370, 371
Pickford v. Brown	476, 492	Podmore v. Gunning	928
Pickup's Will, Re	808	Polden v. Bastard	175
Pickwell v. Spencer	721	Pollard's Trusts, Re	723
Pidgeley v. Rawling	108	Pollen v. Brewer	11, 20
Piercy v. Roberts	976	Pollock v. Booth	495
Pierce v. Win	463	—— v. Day	567
Piers v. Hoe	342	—— v. Pollock	310
—— v. Piers	378	Pollok v. Kelly	900
—— v. Tuite	378	Pomfret v. Ricroft	169, 170, 218
—— v. Winn	969	Poole's Case	314, 463,
Pierson v. Garnett	801	Poole v. Bott	843
—— v. Vickers	610	—— v. Poole	608
Pieschel v. Paris	574	—— v. Terry	858
Piggot v. Birtles	318	Poor v. Mial	565
—— v. Stratton	204	Poplar v. Blackwall Free	
Pigot v. Bullock	108, 111	School, In re	579
Pile v. Salter	835	Popplewell v. Hodgkinson	212
Pilkington v. Boughhey	554, 563, 564	Porter's Case	536
—— v. Hastings	321	—— Trust, Re	908
Pimb's Case	788	Porter v. Bradley	686
Pinbury v. Elkin	684, 692	—— v. Fox	476, 492
		—— v. Porter	891

	PAGE		PAGE
Radcliffe v. Portland (Duke of)	225	Regnart v. Porter	12
Radford v. Radford	686, 690	Rehoboth Chapel, In re	572
Radnor v. Vandebendy	366	Reid v. Reid	407, 411, 415
Raggett v. Beaty	616	Reilly v. Thompson	233
Raikes v. Townsend	224	Remnant v. Hood	858
Raleigh's (Sir Walter) Case	763, 767, 770, 771	Ren v. Bulkeley	383
Ralph v. Carrick	507, 512, 643	Rennell v. Lincoln (Bishop of)	262
— v. Watson	664	Rennington v. Cole	73
Rameshur Pershad Navain		Renshaw v. Bean	234, 235
Singh v. Koonj Behari Pattuk	Add.	Repington v. Tamworth School (Governors of)	258, 259
Ramsay v. Blair	177, 178	Revel v. Watkinson	99
— v. Shelmerdine	910, 914	Rex v. Bridger	787, 792
Randall v. Stevens	10	— v. Chester (Bishop of)	258
— v. Tuchin	724	— v. Collett	12
Ranelagh v. Ranelagh	655, 693	— v. Cottou	318
Ranking's Settlement Trusts, Re	897	— v. Hermitage (Inhabitants of)	230
Ratcliffe v. Hampson	406, 488	— v. Llandaff (Bishop of)	730
Rawe v. Chichester	93	— v. Mildmay	790
Rawlinson v. Montague (Duchess of)	53	— v. Neville	217
Rawson v. Eicke	29	— v. Newman	536
Rawstron v. Taylor	193, 195	— v. Norwich (Bishop of)	279
Ray v. Pung	70	— v. Osbourne	583
Rea v. Williams	885	— v. Pomfret (Earl of)	295
Read v. Gooding	476, 492	— v. Portington	541, 543
— v. Hodgens	542	— v. Robinson	980
— v. Snell	692, 720, 863	— v. Rochester (Bishop of)	257
— v. Stedman	784	— v. Rosewell	224
— v. Willis	678	— v. St. Austell (Inhabitants of)	295
Reade v. Morpeth	733	— v. Stafford (Marquis of)	651
Reading (Corporation of) v. Lane	535	— v. Sutton	730, 784
Reay v. Rawlinson	728	— v. Varlo	583
Reech v. Kenningate	928	Reynard v. Spence	74
Rees v. Perrot	32	Reynaud v. Fourangeau	972
Reeve v. Att.-Gen.	578, 581, 780	Reynell v. Reynell	354, 355, 720
Reeves v. Brymer	926	Reynish v. Martin	856
— v. Creswick	95, 96	Reynolds, In re	759
Reg. v. Aire and Calder Navigation Company	211	— v. Blake	258
— v. Eastern Counties Railway Company	228	— v. Whelan	936
— v. Foley (Lord)	258	— v. Wright	57, 776
— v. Great Northern Railway Company	228	Reynoldson v. Blake and the Bishop of London	260
— v. London and Southampton Railway Company	30	Rhodes v. Muswell Hill Land Company	974
— v. St. Mary, Lambeth	266	— v. Rhodes	617
— v. Sewell	34	— v. Whitehead	478, 841
— v. Traill	34	Rice's (George ap) Case	60, 107
Regent United Service Stores, In re	318	Rice v. McQuade	17
		Rich v. Woolley	323
		Richards v. Bergavenny (Lady)	750, 752
		— v. Fry	189

	PAGE		PAGE
Richards <i>v.</i> Harper	169, 210	Rittson <i>v.</i> Stordy	782
—— <i>v.</i> Richards 170, 223, 739,	961	Riviere <i>v.</i> Bower	173
—— <i>v.</i> Rose	213, 214	Roach <i>v.</i> Trood	413, 417, 419
—— <i>v.</i> Squibb	130	Robb <i>v.</i> Donan	537
Richardson <i>v.</i> Gifford	25	—— <i>v.</i> Dorrian	588
RICHARDSON <i>v.</i> LANGRIDGE....	4	Robbins <i>v.</i> Jones	218
—— ..12, 18,		Roberts <i>v.</i> Dixall.....	418, 421
—— ..23, 26		—— <i>v.</i> Dixwell	61, 418, 606
—— <i>v.</i> Moore	98	—— <i>v.</i> Edwards.....	908
—— <i>v.</i> Power	844	—— <i>v.</i> Haines	207, 209
—— <i>v.</i> Richardson....	896	—— <i>v.</i> Karr	176
—— <i>v.</i> Simpson ..	418, 420	—— <i>v.</i> Macord	202
—— <i>v.</i> Watson 920, 934,	938	—— <i>v.</i> Rose	171, 224
—— <i>v.</i> Yardley	669	—— <i>v.</i> Walker	792
Rickard <i>v.</i> Robson	538	Robertson <i>v.</i> Fraser	896
Rickards <i>v.</i> Rickards	93	Robins <i>v.</i> Rose	981
Ricket <i>v.</i> Metropolitan Rail. Co.	229	Robinson <i>v.</i> Duleep Singh....	141
Rickett <i>v.</i> Guillemard	911	—— <i>v.</i> Geldard	562
Ricketts <i>v.</i> Loftus	422	—— <i>v.</i> Grey....	355, 358, 723
—— <i>v.</i> Turquand	935	—— <i>v.</i> Harcastle..	411, 485,
Rickit's Trusts, In re.....	937	—— ..489, 494	
Rider <i>v.</i> Smith	218	—— <i>v.</i> Hicks	607, 617
—— <i>v.</i> Wager	903	—— <i>v.</i> Hofman	320
—— <i>v.</i> Wood	741	—— <i>v.</i> Hunt	654
Ridge's Trusts, In re.....	660	—— <i>v.</i> Jago	267
Ridgeway <i>v.</i> Munkittrick	617	—— <i>v.</i> Litton	742
Ridgway <i>v.</i> Ridgway	852	—— <i>v.</i> London Hospital..	561,
—— <i>v.</i> Stafford (Lord) ..	325	—— ..568, 569	
Ridout <i>v.</i> Pain	724	—— <i>v.</i> Palmer	141
Rigden <i>v.</i> Vallier 879, 885, 887,	894	—— <i>v.</i> Robinson ..	554, 566,
Rigg <i>v.</i> Lonsdale (Earl)	140	—— ..607, 616, 617, 753	
Right <i>d.</i> Compton <i>v.</i> Compton	720,	—— <i>v.</i> Waddington	326
—— ..721, 722		—— <i>v.</i> Wray	140, 152
—— <i>d.</i> Cutting <i>v.</i> Darby	6	Robson <i>v.</i> Att.-Gen.	785
—— <i>d.</i> Fisher <i>v.</i> Cuthell ..	30, 31	—— <i>v.</i> Whittingham..	203, 225,
—— <i>d.</i> Lewis <i>v.</i> Beard	12, 20	—— ..226	
—— <i>d.</i> Phillips <i>v.</i> Smith..	354, 606	Rochdale Canal Co. <i>v.</i> King..	193
—— <i>d.</i> Shortridge <i>v.</i> Creber..	613	—— <i>v.</i> Radcliffe ..	188
—— <i>v.</i> Bawden	56	Rochford <i>v.</i> Hackman ..	974, 978,
—— <i>v.</i> Creber	602	Roeke <i>v.</i> Roeke	975
—— <i>v.</i> Day	687	Rockey <i>v.</i> Huggens	137
—— <i>v.</i> Darby	28	—— ..980, 982	
—— <i>v.</i> Hamond	664	Rockingham (Lord) <i>v.</i> Penrice	286,
—— <i>v.</i> Sidebotham	720	—— ..299, 301	
Riley <i>v.</i> Garnett..	354, 356, 473, 841	Roddam <i>v.</i> Morley	958
Rimington <i>v.</i> Cannon.....	619	Roddy <i>v.</i> Fitzgerald..	608, 613, 693
Ring <i>v.</i> Hardwick ..	476, 492, 493	Roden <i>v.</i> Eyton	326
Ringrose <i>v.</i> Bramham	805, 807	Roe <i>d.</i> Aistrop <i>v.</i> Aistrop....	606
Ripley <i>v.</i> Waterworth	51	—— <i>d.</i> Allport <i>v.</i> Bacon	724
Rippen <i>v.</i> Priest.....	997	—— <i>d.</i> Bendall <i>v.</i> Summerset	643
Rippon <i>v.</i> Norton	977	—— <i>d.</i> Blair <i>v.</i> Street	18
Riseley <i>v.</i> Ryle.....	12, 24, 317	—— <i>d.</i> Bowes <i>v.</i> Blackett....	725
Rishton <i>v.</i> Cobb	972	—— <i>d.</i> Brune <i>v.</i> Prideaux ..	24
		—— <i>d.</i> Callow <i>v.</i> Bolton	720

	PAGE		PAGE
Roe <i>d. Child v. Wright</i>	724	Rouse's Estate	849
— <i>d. Crow v. Baldwere</i>	749	Routledge <i>v. Dorril</i> 406, 409, 411, 412, 439, 452, 484, 485, 487, 495	
— <i>d. Dodson v. Grew</i>	617	Row, <i>In re</i>	759
— <i>d. Durant v. Doe</i>	28	Rowbotham <i>v. Dunnnett</i>	563
— <i>d. Fulham v. Wickett</i>	870	— <i>v. Wilson</i> 168, 169, 170, 207, 210, 211, 213	
— <i>d. Henderson v. Charnock</i>	28	Rowden <i>v. Malster</i>	749
— <i>d. Kirby v. Holmes</i>	719	Rowe <i>v. Power</i>	81, 83
— <i>d. Reade v. Reade</i> 987, 991, 992, 993		Rowland <i>v. Cuthbertson</i> 79, 80 — <i>v. Tawney</i> 476, 492, 842	
— <i>d. Rew v. Lucraft</i>	654	Rowlatt <i>v. Easton</i>	935
— <i>d. Sheers v. Jeffery</i>	688	Roy <i>v. I'Evesq. de Norwich</i>	280
— <i>d. Shell v. Pattison</i>	726	Ruce <i>v. Steel</i>	494
— <i>d. Thong v. Bedford</i>	607	Ruck <i>v. Barwise</i>	883
— <i>d. Wren v. Clayton</i>	660	Rucker <i>v. Scholefield</i>	408
— <i>v. Blackett</i> 719, 723		Rudge <i>v. Barker</i>	911
— <i>v. Collis</i>	683	Rudyard's Estate, <i>Re</i>	88
— <i>v. Ferrars</i>	9	Rugby School, <i>Case of</i>	536
— <i>v. Grew</i>	621	Rumball <i>v. Munt</i>	30
— <i>v. Holmes</i>	723	Rumsey <i>v. Rawson</i>	129
— <i>v. Jeffery</i> 448, 467, 468		Runcorn <i>v. Doe d. Cooper</i> 181, 182, 185	
— <i>v. Pogson</i>	422	Rundle <i>v. Rundle</i>	56
— <i>v. Popham</i>	342	Ruscombe <i>v. Hare</i>	103
— <i>v. Tranmer</i>	346	Russel and Broker's Case	134
— <i>v. Wiggs</i>	32	— <i>v. Buchanan</i>	839
Roffey <i>v. Henderson</i>	314	Russell <i>v. Clowes</i>	784
Rogers, <i>Ex parte</i> 641, 646, 655		— <i>v. Harford</i>	175
— <i>v. Birkhead</i>	972	— <i>v. Kellett</i>	581
— <i>v. Brenton</i>	137	— <i>v. Long</i>	898
— <i>v. Grazebrook</i>	15	— <i>v. Russell</i>	563
— <i>v. Holled</i>	268	Rutherford <i>v. Maule</i>	784
— <i>v. Maule</i>	777	Rutland's (Countess of) Case	351
— <i>v. Mutch</i> 805, <i>Add.</i>		Ryall <i>v. Hannam</i>	935
— <i>v. Taylor</i> 168, 177, 207, 211, 220		Ryan <i>v. Cowley</i> 617, 621, 651 — <i>v. Shilcock</i>	322
Rolle <i>v. Whyte</i>	167, 183	Rye's Settlement 466, 687, 688, 689	
Rolt <i>v. Somerville (Lord)</i> 115, 116,		Rylands <i>v. Fletcher</i>	196
Romilly <i>v. James</i>	649	Ryves <i>v. Ryves</i>	890
Ronayne <i>v. Sherrard</i>	27		
Rooke <i>v. Rooke</i>	415, 417		
Rooper <i>v. Harrison</i>	257		
Roper <i>v. Halifax</i>	385		
— <i>v. Roper</i> 673, 753			
Rose <i>d. Vere v. Hill</i>	720		
— <i>v. Groves</i>	195		
— <i>v. Reynolds</i>	77		
Roseingrave <i>v. Burke</i>	309		
Rosewell <i>v. Pryor</i>	173		
Ross <i>v. Fedden</i>	198		
— <i>v. Ross</i> 754, 972			
Rosslyn's Trust	506, 509		
Rotheram <i>v. Green</i>	147		
Rous <i>v. Artois</i>	1		
ROUSE'S CASE	1		
—	1, 8, 9		

S.

Sabbarton <i>v. Sabbarton</i> 458, 686, 867	
Sacheverel <i>v. Frogate</i>	300
Sacheverill <i>v. Porter</i>	130, 146
Saddlers' Company's Case	779
Sadgrove <i>v. Kirby</i>	144, 145
Sadler, <i>In re</i>	794
— <i>v. Pratt</i>	405, 418
Saffyn's Case	372
St. Albans (The Duke of) <i>v.</i> Skipworth	109

	PAGE		PAGE
St. Aubin <i>v.</i> St. Aubin ..	306, 510	Saunders <i>v.</i> Mose	221
St. David's (Bishop of) <i>v.</i> Lucy	276	——— <i>v.</i> Newman 192, 197,	236
St. Mary, Newington (Vestry		——— <i>v.</i> Vautier 491, 852,	975
of) <i>v.</i> Jacobs	233	——— <i>v.</i> Watson	793
St. Nicholas, Deptford (Church-		Savage <i>v.</i> Robertson	932
wardens of) <i>v.</i> Sketchley ..	30	——— <i>v.</i> Tyers	648
St. Pancras Burial Ground, In re	576	Savery <i>v.</i> Dyer	677
St. Paul's (The Dean and		Savile <i>v.</i> Blacket .. 386, 387,	388
Chapter of) Case	402	Saville's Case	753
St. Paul <i>v.</i> Dudley	953, 960	Saye's Case	131
——— <i>v.</i> Heath	518	Sayer's Trusts, In re ...	465, 480
Salaman <i>v.</i> Glover	230	Sayer <i>v.</i> Masterman	606
Salisbury <i>v.</i> Petty .. 655, 858,	908	——— <i>v.</i> Sayer	577
——— (Bishop of) <i>v.</i> Philips	263,	Scarborough (Earl of) <i>v.</i> Doe	
——— (Marq. of) <i>v.</i> Glad-	264	<i>d.</i> Saville	470
stone .. 211		Scarlsbrick <i>v.</i> Skelmersdale ..	488,
——— <i>v.</i> Salis-			506
bury	137, 138,	Scatterwood <i>v.</i> Edge	438, 871
Salkeld <i>v.</i> Vernon	654, 801	Scawin <i>v.</i> Watson	493
Sallery, Re	656, 862	Scholefield <i>v.</i> Lockwood	98
Salmon <i>v.</i> Green	803	Scholes <i>v.</i> Hargreaves 128, 129,	130
——— <i>v.</i> Salmon	477	School Board for London <i>v.</i>	
——— <i>v.</i> Tidmarsh	678, 846	Faulconer	579
Salter <i>v.</i> Brunsden	329	Scott <i>v.</i> Bargeman	661
——— <i>v.</i> Butler	51, 297	——— <i>v.</i> Cumberland	917
Salters' Company <i>v.</i> Jay	203	——— <i>v.</i> Davis	113
Salisbury <i>v.</i> Denton	557	——— <i>v.</i> Forristall	562
Sambourne <i>v.</i> Barry	647	——— <i>v.</i> Harwood	802
Sammes's Case	341, 346	——— <i>v.</i> Scarborough (Earl of)	508,
Sampson <i>v.</i> Hoddinott .. 183, 192,			808
	193, 197	——— <i>v.</i> Scott	673, 677, 1001
Samuel <i>v.</i> Samuel	865	Scrape <i>v.</i> Rhodes	467, 649
Sandell <i>v.</i> Franklin	26	Scrope <i>v.</i> Offley	386
Sanders' Trusts, In re	654	Seagood and Hone's Case	628
Sanders <i>v.</i> Ashford 910, 914		Seagrave <i>v.</i> Knight	112
——— <i>v.</i> Ballard	887	Sealo <i>v.</i> Barter 672, 673,	693
——— <i>v.</i> Cornish	436	——— <i>v.</i> Seale	862
——— <i>v.</i> Miller	850	Sealey <i>v.</i> Stawell	309, 686
Sanderson's Trust, In re 831, 849,		Seaman <i>v.</i> Wood	476
	977	Seaward <i>v.</i> Willock	494
Sandford <i>v.</i> Raikes	935	Seccombo <i>v.</i> Edwards	686
Sands <i>v.</i> Dixwell	865	Segrave <i>v.</i> Barber	13, 20
Sandwich (Earl of) <i>v.</i> Great		Selby <i>v.</i> Alston	71
Northern Railway Company <i>Add.</i>		——— <i>v.</i> Browne	332
Sanford <i>v.</i> Irby 355, 468,	687	——— <i>v.</i> Crystal Palace District	
Sangeson <i>v.</i> Cruise	98	Gas Company	220
——— <i>v.</i> Sealy	98	——— <i>v.</i> Greaves	313
Sansbury <i>v.</i> Read	854	——— <i>v.</i> Nettlefold	218
Sapsford <i>v.</i> Fletcher	299	——— <i>v.</i> Robinson	134
Sarel <i>v.</i> Sarel	645, 898	Selsey (Lord) <i>v.</i> Lake (Lord)	952,
Saumarez <i>v.</i> Saumarez	493		959
Saunders <i>v.</i> Eppo	361	Selwood <i>v.</i> Mildmay	924
——— <i>v.</i> Lowe	614	Selwyn <i>v.</i> Selwyn	728, 729
		Semayne's Case	45

	PAGE		PAGE
Senhouse v. Christian	170, 219, 221	Shelley's Case	366, 467, 600, 601, 604, 609, 614, 615, 616, 618, 621, 623, 624, 718, 727, 751, 753, 862, 864, 865
— v. Earl	89	Shelton v. Watson	624
Sergison, Ex parte	988, 992	Shepherd v. Beetham	560
— v. Sealey	754	Shepherd v. Ingram	803
Sewell v. Crew-Read	554, 555	Shepherdson v. Dale	889
— v. Denny	511	Sheppard's Trusts, In re	872
Sewers (Commissioners of) v. Glasse	132, 137, 141	Sheppard v. Gibbons	896
SEYMOR'S (EDWARD) CASE	706	— v. Lessingham	686, 690
—	50, 70, 347, 369, 373, 716, 742, 748	Sherley v. Underhill	260
Seymour v. Bennet	263, 265, 266	Sherman v. Collins	858
— v. Kilbee	Add.	Sherrard v. Harborough (Lord)	265, 274, 275
— v. Lucas	981	Sherratt v. Mountford	934, 938, 939
Seys v. Price	953	Sherwin v. Kenney	355, 356, 613
Shadbolt v. Thornton	554	Shipperdson v. Tower	306
Shaftesbury (Earl of) v. Marlborough (Duke of)	93, 94, 95	Shopland v. Rydler	9
Shafto v. Johnson	209	Shoplane v. Roydler	263
Shailard v. Baker	724	Shore v. Billingsley	887
Shakespeare v. Peppin	141	— v. Shore	101
Shapland v. Smith	354, 602	— v. Wilson	926, 934
Shard v. Stone	48	Short d. Gastrell v. Smith	910
Sharp's Case	311	Shrewsbury's (Countess of) Case	20
Sharp v. Cosserat	978, 981	— (Earl of) Case	161, 164, 371
— v. St. Sauveur	782	— (Lady) Case	22
— v. Sharp	726	Shrewsbury School, In re	275
— v. Waterhouse	167	— (Countess of) v. Shrewsbury (Earl of)	956
Sharpe v. Sharpe	994, 995	— v. Hornby	542
Sharshaw v. Gibbs	87, 102	Shrimpton v. Shrimpton	845, 846, 849
Shaw, Ex parte	994, 995	Shuldham v. Smith	834
— v. Barbor	18	Shnm v. Hobbs	846
— v. Bran	793	Shury v. Piggott	154
— v. Ford	973	Shuttleworth v. Greaves	801, 905, 912
— v. Jersey (Earl of)	Add.	Sibley v. Cook	916
— v. McMahon	910, 912, 914	Sibthorpe v. Moxom	905
— v. Rhodes	507, 508, 509, 510, 517, 518	— v. Moxton	905
— v. Thompson	266	Siddons v. Short	212
— v. Weigh	617, 724	Sidebotham v. Watson	356
— v. Woods	271	Sidney v. Sidney	67
Sheaf v. Cave	72	— v. Wilmer	508
Shedden, In re	742	Silberschildt v. Schiott	997
— v. Att.-Gen.	742	Sillick v. Booth	911
Shee v. Hale	980	Silvester d. Law v. Wilson	602
Sheffield's (Seignior) Case	765	— v. Jarman	997
Sheffield v. Orrery (Lord)	438, 450, 685, 836	— v. Wilson	354
— v. Ratcliff	738	Simex v. Marshall	294
— v. Ratcliffe	262	Simmonds v. Cock	837, 839
— Industrial Society v. Jarvis	168		
Sheldon v. Bret	247, 249, 253		
SHELLEY'S CASE	589		

	PAGE		PAGE
Simmons v. Norton	106, 109	Smith v. Camelford (Lord)	406, 494
— v. Rudall	642	— v. Charles	931, 933
— v. Simmons	688, 693, 862	— v. Clay	366
— v. Pitt	512, 513	— v. Clever	862
Simon v. Barber	583	— v. Coney	862, 919, 939, 940
Simons v. Blake	787	— v. Cooke	89
Simper v. Foley	186, 231	— v. Darby	209, 210
Simpkin v. Ashurst	8	— v. Death	390, 693
Simpson v. Ashworth	469, 720	— v. Egginton	16
— v. Bathurst	384	— v. Fitzgerald	663
— v. Gutteridge	76	— v. Fletcher	198
— v. Hartopp	316	— v. Frederick	953
— v. O'Sullivan	98	— v. Gt. Western Rail. Co.	209,
— v. Peach	843		211
— v. Simpson	691, 749	— v. Houblon	391
Sims v. Thomas	334	— v. Howden	206
— v. Quinlan	543, 581	— v. Howth	171
Sing v. Leslie	393, 961	— v. Humble	299
Singleton v. Gilbert	802, 804	— v. Kenrick	198
— v. Singleton	802	— v. Lidiard	938
Sinnett v. Herbert	556, 557, 563, 570, 581	— v. Maitland	666
Sitwell v. Bernard	847	— v. Oakes	645
Six Carpenters' Case	324, 328	— v. Oliver	555, 556, 559, 581, 908
Skerratt v. Oakley	663	— v. Seghill, Overseers of . .	14
Skerry v. Preston	300	— v. Shelboun	279
Skey v. Barnes	661	— v. Smith	77, 227, 357, 476, 723, 856
Skingley, Re	110	— v. Spencer	71, 837
Skinner v. Ogle	917	— v. Thackerah	208
Skull v. Glenister	170, 223	— v. Tyndal	710, 720
Slade v. Drake	271	— v. Warren	464
— v. Pattison	56	— v. Widlake	24
Sladen v. Sladen	741	— v. Wilson	934
Slark v. Dakyns	484, 486	— v. Wright	324
Slater v. Dangerfield	622, 752	Smyth's Case	160
Slingsby v. Barnard	213	Smyth, Ex parte	286, 287, 302
Small v. Wing	847	Smythe v. Power	651
Smallman v. Pollard	317	Snape v. Turton	379, 387
Smart v. Morton	207, 209	Snell v. Clay	66
— v. Prujean	541	— v. Finch	321
Smartle v. Penhallow	56	Sneyd v. Sneyd	83, 345
— v. Williams	9	Snow v. Poulden	839
Smell v. Dee	845	Snowball v. Proctor	677
Smethurst v. Tomlin and Bankes	791	Snowdon v. Dales	976
Smith's (Betty) Trusts	834, 872	Snowe v. Cuttler	437
— Case	263, 369	Socket v. Wray	970
— Estate, In re	993, 994	Solley v. Wood	93, 96
— Will, Re	849, 854	Sollory v. Leaver	293, 294
Smith, Re	663, 664, 803	Solme v. Bullock	135, 146
— v. Adams	72, 74	Solomon v. Vintners' Co. . .	168, 214, 215
— v. Baynard	131	Somerset Coal Canal Company	
— v. Brownlow (Earl)	140, 143	— v. Harcourt	171
— v. Byrne	22		
— v. Camelford	70		

	PAGE		PAGE
Somerville v. Lethbridge ..	450, 494	Stafford (Earl of) v. Buckley	69, 685, 727, 748
Sondy's Case	463	—— (Marquis of) v. Coyney	205
Sondes' (Lord) Will, Re	407	—— (Mayor and Burgesses of) v. Bolton	264
Sons of the Clergy (Corp. of) v. Mose	585	Staffordshire, &c. Canal Navigation, Proprietors of	187, 202
Sorresby v. Hollins	557	Staight v. Burn	226, 235
Soulsby v. Neving	35	Stainton v. Woolrych	196
South v. Williams	905	Stamford v. Bruges	131
South Eastern Railway Company, In re	759	Stampe v. Burgesse	146
South Metropolitan Cemetery Company v. Eden	205, 222	Standen v. Standen	936
Southampton (Lord) v. Hertford (Marquis of) ..	442, 489, 491, 501, 509	Standley's Estate, In re ..	930, 931
Southby v. Stonehouse ..	89, 685	Standred v. Shorditch	128
Southcoat v. Manory	352	Stane's Will, Re	579
Southern v. Wollaston ..	466, 476	Stanford v. Roberts	88
Southmolton (Mayor of) v. Att.-Gen.	575	Stanhope's Trusts, Re	865, 912
Southwell v. Wade	780	Stanhope v. Lincoln (Bishop of)	259
Sowerby's Trust	906	Stanhouse v. Gaskell	648, 657
Sowerby v. Fryer	106, 107	Stanley of Alderney (Lady) v. Shrewsbury (Earl of) ..	227
—— v. Smith	152	Stanley v. Hayes	332
Spark v. Purnell	721	—— v. Jackman	888
Sparks v. Restal	655	—— v. Leigh 434, 445, 452,	654
Sparling v. Parker 560, 562,	868	—— v. Lennard	648, 653
Speaker v. Styant	148	—— v. Stanley	839, 925
Speakman v. Speakman 465,	492	—— v. Wise	804
Specot's Case	269	Stansell v. Jollard	213, 215
Spence v. Spence	354, 357, 601, 602	Stansfield v. Habbergham	742
Spencer v. Scurr	108, 109	Stapilton v. Stapilton	351
—— v. Wilson	849, 913	Staple v. Heydon	178
Spenser v. Chase	744	STAPLETON v. CHEALES	820
Spicer v. Spicer	721	——	823, 824, 832, 844, 845, 848
Spirt and Bence's Case	629	—— v. Cheele	820
Spokes v. Banbury Board of Health	217	Starkey and Dryop's Case ..	370
Spoor v. Green	207	—— v. Pool	273
Sprackling v. Ranier	807, 808	Statham v. Bell	871
Springett v. Jennings	563	Staunton v. Peck	658
Spry v. Bromfield	725	Stauntons, Minors, In re	868
Spurgin v. White	14	Stead v. Platt	60
Spurstone's Charity, In re ..	572	Steadman v. Pulling	61, 62
Spyer v. Hyatt	79	Steede v. Berrier	920
Squire v. Campbell	204	Steele v. Bosworth	294
—— v. Compton	98	Stephen v. Buttridge	711
—— v. Ford	964	—— v. Stephen	841
Stables v. Mellor	131	Stephens v. Bailly	780
Stackpole v. Beaumont	856	—— v. Gadsden	407, 493
Stackpoole v. Parkinson	31	—— v. Hide	896, 898
—— v. Stackpoole ..	409, 494	—— v. Stephens	438, 455, 458
Stafford's (Lord) Case	370	—— v. Wall	244

	PAGE		PAGE
Sweet v. Meredith	274, 277	Taylor v. Frobisher	490, 843
Sweetapple v. Bindon	61, 624	— v. Haygarth	775, 784
Sweeting v. Prideaux	653	— v. Henniker	322
— v. Sweeting	564	— v. Hord	745
Swindon Waterworks Co. v.		— v. Lambert	848, 859
Wilts and Berks Canal Navi-		— v. Linley	560
gation Co.	194	— v. Richardson	941
Swinfen v. Bacon	11, 35	— v. Shafto	209
— v. Swinfen	952, 953, 960, 961	— v. Shaw	463
Swire v. Leach	315	— v. St. Helen's (Corpo-	
Sydney v. Vaughan	845	ration of)	221
Sykes v. Sykes	470, 488, 914	— v. Taylor	328
Symers v. Jobson	865	— v. Whitehead	168, 218
Symonds v. Marine Society	553	— v. Zamira	299
Symons v. Symons	27, 302	Taylorson v. Peters	320
Sympson v. Hornsby	612	Teague's Settlement, In re	487, 493
Synge's Trust, Re	686, 689	Tee v. Ferris	563, 928
Synge v. Synge	982	Tempest v. Tempest	562
		Templeman v. Warrington	661
		Templemoyle School, In re	581
		Tenant v. Goldwin	174, 219
		Tench v. Cheese	507
		Tennent v. Tennent	493
		Tenny d. Gibbs v. Moody	345, 602
		— v. Agar	649, 686, 719
		Tew v. Jones	13
		Tewart v. Lawson	515
		Thackeray v. Wood	170
		Thatcher's Trust, Re	490, 842
		Theebridge v. Kilburne	650
		Theed v. Debenham	225
		Thellusson v. Woodford	65, 440,
		443, 445, 447, 451, 452, 456, 459,	
		462, 500, 505, 539	
		Thetford (Mayor of) v. Tyler	24
		— School Case (The)	574
		Thicknesse v. Liege	854
		Thirtle v. Vaughan	995, 1001
		Thomas v. Harries	324
		— v. Howell	536, 537, 554
		— v. Kemeys	949, 952, 953, 954
		— v. Lloyd	404
		— v. Packer	24, 25
		— v. Sylvester	312
		— v. Thomas	167, 197, 230,
		484, 485, 919, 924, 942	
		Thomasin v. Mackworth	744
		Thomlinson v. Dighton	388, 416
		Thompson's Estate, Re	751
		— Trusts, Re	647, 653,
		792, 853	
		Thompson v. Corby	535, 537
		— v. Dow	858
		— v. Grant	993

	PAGE		PAGE
Thompson <i>v.</i> Mashiter	315	Toplis <i>v.</i> Baker.....	905, 907
—— <i>v.</i> Shakspeare.....	495, 540, 558, 582	Torrano <i>v.</i> Young	22
—— <i>v.</i> Thompson ..	27, 300, 328, 538, 560	Torrington (Lord) <i>v.</i> Bowman	726
—— <i>v.</i> Waterlow	175	Tothill <i>v.</i> Pitt	862
—— <i>v.</i> Whitelock	663, 908	Totty <i>v.</i> Nesbitt	181
Thomson <i>v.</i> Hempenstall	941	Toulmin <i>v.</i> Steere 962, 964, 965,	966
Thong <i>v.</i> Bedford	607	Towers <i>v.</i> Moor	927
Thornber <i>v.</i> Wilson ..	537, 553, 554	Townley <i>v.</i> Bedwell	69, 539
Thornel <i>v.</i> Lassels	130	—— <i>v.</i> Bolton	645, 898
Thornton <i>v.</i> Adams	319, 323	Towns <i>v.</i> Wentworth....	651, 653
—— <i>v.</i> Bright	421, 487	Townsend <i>v.</i> Carus.....	537, 539
—— <i>v.</i> Howe	537, 539	—— <i>v.</i> Early	808, 979
—— <i>v.</i> Kempson	559, 560	—— <i>v.</i> Wilson	1006
Thorowgood <i>v.</i> Collins	896	Townson <i>v.</i> Tickell.....	69
Thorp <i>v.</i> Owen	741	Tracey <i>v.</i> Brennan	323
Thorpe <i>v.</i> Brumfitt	169, 170	Tracy <i>v.</i> Butcher.....	845
—— <i>v.</i> Goodall	380	—— <i>v.</i> Hereford (Lady)..	99, 103
—— <i>v.</i> Thorpe	473, 602	—— <i>v.</i> Tracy	115
Threr <i>v.</i> Barton	333	Traders' North Staffordshire Carrying Co., In re....	327, 328
Thrupp <i>v.</i> Collett	541	Trafford <i>v.</i> Boehm	688
Thruston, Re	842	Trahern's Case	204
—— <i>v.</i> Anstey	852	Trappes <i>v.</i> Harter	314
Thrustout <i>d.</i> Gower <i>v.</i> Cun- ningham	733	—— <i>v.</i> Merewith	981
Thruxton <i>v.</i> Att.-Gen.	774	Tregame <i>v.</i> Fletcher	352
Thunder <i>v.</i> Belcher	15	Tregonwell <i>v.</i> Sydenham	444, 465, 470, 478
—— <i>d.</i> Weaver <i>v.</i> Belcher.	9	Trench <i>v.</i> St. George	93
Thurston, Re	851	Trent <i>v.</i> Hanning	356
Thwaytes <i>v.</i> Dye	398, 399, 421	—— <i>v.</i> Hunt....	17, 320, 321, 322
Thynn <i>v.</i> Thynn	928	Tress <i>v.</i> Savage	29
Tibbits <i>v.</i> Tibbits	971	Trethewy <i>v.</i> Helyar.....	915, 917
Tickle <i>v.</i> Brown	187, 188, 189	Trevillian <i>v.</i> Andrews	10
Tidwell <i>v.</i> Ariel	908	Trevor <i>v.</i> Trevor 344, 493, 623, 661, 663, 950, 956	
Tiffin <i>v.</i> Longman	897	Trewen <i>v.</i> Relfe	892
Tilly <i>v.</i> Colyer.....	663	Trickey <i>v.</i> Trickey	514
Tily <i>v.</i> Smith	847	Trimlestown <i>v.</i> D'Alton (Lord)	927
Timewell <i>v.</i> Perkins.....	721, 726	Trollope <i>v.</i> Linton	421
Tinckler <i>v.</i> Prentice.....	287, 298	—— <i>v.</i> Routledge	419
Tippet <i>v.</i> Eyres	377	Trotter <i>v.</i> Oswald	692
Titely <i>v.</i> Wolstenholme	1004, 1005, 1006, 1007, 1008	Troward <i>v.</i> Cailland	261
Titterton <i>v.</i> Conyers	229	Trower <i>v.</i> Butts	801
Tiverton Market Act, In re	657, 884	—— <i>v.</i> Knightley	394
Tobin <i>v.</i> Stowell	222	—— <i>v.</i> Newcome	274
Tollemache <i>v.</i> Coventry (Earl of)		Trulock <i>v.</i> White	145
——	478, 482, 483	Truscott <i>v.</i> Merchant Tailors' Company	203
—— <i>v.</i> Tollemache ..	111, 112	Trye <i>v.</i> Gloucester (Corporation of).....	555
Toller <i>v.</i> Attwood.....	357, 609	Tucker <i>v.</i> Sangor	412, 415
Tomkins <i>v.</i> Tomkins	646	—— <i>v.</i> Tucker	415
Tomkyns <i>v.</i> Blane	415	Tuckerman <i>v.</i> Jefferies	898
Took <i>v.</i> Glasecock	709	Tuffnell <i>v.</i> Borrell	751
Tooker <i>v.</i> Annesley	111, 112	—— <i>v.</i> Page	724
Toovey <i>v.</i> Basset	687, 722		

	PAGE
Tugwell <i>v.</i> Scott	932
Tulk <i>v.</i> Moxhay	204
Tullett <i>v.</i> Armstrong	85, 985
Tulton <i>v.</i> Darke	298
Tunaley <i>v.</i> Roche	647
Tunstall <i>v.</i> Brachen	858
— <i>v.</i> Trappes	645
Tupper <i>v.</i> Tupper	564
Turner, Re	356
— <i>v.</i> Barnes	16, 20
— <i>v.</i> Cameron	314
— <i>v.</i> Crush	<i>Add.</i>
— <i>v.</i> Doe <i>d.</i> Bennett	19, 20
— <i>v.</i> Frampton	693
— <i>v.</i> Frederick	661
— <i>v.</i> Hodges	778
— <i>v.</i> Hudson	800
— <i>v.</i> Martin	906
— <i>v.</i> Maule	785
— <i>v.</i> Mirfield	227
— <i>v.</i> Ogden	538
— <i>v.</i> Sheffield & Rotheram Railway Company	229
— <i>v.</i> Spooner	223
— <i>v.</i> Whittaker	645, 896, 898
— <i>v.</i> Wright	742
— and Dennie's Case ..	161
Turney <i>v.</i> Sturges	83
Turnough <i>v.</i> Stock	722
Turvin <i>v.</i> Newcome	488, 506
Tutton <i>v.</i> Darke	319
Twohill, In re	<i>Add.</i>
Twopeny <i>v.</i> Peyton	976
Tyler <i>v.</i> Lake	953, 961
— <i>v.</i> Seed	28
Tyrell <i>v.</i> Jenner	282
— <i>v.</i> Marsh	382
Tyrone (Earl of) <i>v.</i> Waterford (Marq. of) 653, 674, 725, 862, 868	
TYRRELL'S CASE	335
— 298, 336, 340, 351, 364, 365, 602	
Tyrtrell <i>v.</i> Clark	304, 308
TYRRINGHAM'S CASE	120
— 127, 128, 132, 135, 146, 156, 158, 256	
Tyrwhitt <i>v.</i> Tyrwhitt	953, 955, 959
Tyson, Ex parte	788
Tyte <i>v.</i> Willis	469, 718, 719

U.

Ulrich <i>v.</i> Litchfield	927
Underhill <i>v.</i> Roden	673, 835

	PAGE
Underwood <i>v.</i> Wing	875, 901, 907
United Land Co. <i>v.</i> Great Eastern Railway Co.	220, 222
Upton <i>v.</i> Ferrers (Lord)	641
— <i>v.</i> Wardman	656
Uthwatt <i>v.</i> Bryant	724, 725
Uttly Dale's Case	50
Uvedall <i>v.</i> Uvedall	111
Uxbridge (Earl of) <i>v.</i> Bayley ..	389

V.

Valentine <i>v.</i> Penny	135, 136
Valpy <i>v.</i> Manley	300
Van <i>v.</i> Clark	856
Van Breda <i>v.</i> Silberbauer ..	192
Vandergucht <i>v.</i> Blake	654
Vanderplank <i>v.</i> King	409, 465, 494, 658, 659, 660, 661, 896
Vanderzee <i>v.</i> Aclom	906
Vane <i>v.</i> Barnard (Lord)	115
— <i>v.</i> Dungannon (Lord) ..	415
Varley <i>v.</i> Lee	312
Varlo <i>v.</i> Faden	514, 515
Vaughan <i>d.</i> Atkins <i>v.</i> Atkins ..	729
— <i>v.</i> Farrer	532, 547
— <i>v.</i> Foakes	663
— <i>v.</i> Headfort (Marquis of)	679
Vaux <i>v.</i> Henderson	907, 913
Vavasour, In re	264
Vavisor's Case	352
Vawdry <i>v.</i> Geddes ..	476, 492, 850, 852
Ven <i>v.</i> Howell	56
Venables <i>v.</i> Morris	361
Verner, Ex parte	984
Vernon's Case	75, 76, 83, 927
Vernon <i>v.</i> Vernon	302
Versturne <i>v.</i> Gardiner	393
Verulam <i>v.</i> Bathurst	603, 862
Vezey <i>v.</i> Jamson	540, 583
Vick <i>v.</i> Sueter	722, 725, 834
Vincent <i>v.</i> Ennys	382
— <i>v.</i> Godson	328
— <i>v.</i> Spicer ..	113
VINER <i>v.</i> FRANCIS	798
— 800, 912	
— <i>v.</i> Vaughan	108
Vizard's Trusts, In re	382
Vizard <i>v.</i> Longden	77
Vize <i>v.</i> Stoney	661, 848, 849
Voller <i>v.</i> Carter	60, 616

	PAGE		PAGE
W.		Walter v. Drew	686, 689
Wade-Gery v. Handley	507, 508	— v. Gunner	259
Wade v. Paget	412	Walters v. Pfeil	215
Wadley v. North	845, 849	Wandsworth Church Estate	
— v. Wadley	93	Charity, In re	583
Wainwright v. Wainwright	645, 646	Warburton v. Farn	383
Wainman v. Field	483, 684	— v. Parke	187, 231
Waite v. Webb	553, 559, 562	Warbuton v. Warbuton	77
Wakefield v. Buccleuch (Duke of)	212	Ward v. Bevil	619
— v. Dyott	842	— v. Burbury	358
Wakley v. Froggatt	171	— v. Everet	885
Walcot v. Hall	823	— v. Gray	677, 678
Waldo v. Cayley	586	— v. Lawton	220
— v. Waldo	111, 112	— v. Robins	190
Waldron v. Boulter	867	— v. Ryan	13
Walgrave v. Tebbs	564	— v. Shew	321
Walker's Case	289	— v. Tyrrell	423
— Estate	997	— v. Ward	187, 233, 881, 891
Walker v. Camden (Marquis of)	888	Warde v. Firmin	415
— v. Denne	774, 775	Wardle v. Brocklehurst	174
— v. Giles	12	Wardroper v. Cutfield	305
— v. Hammersley	277	Ware v. Cann	971
— v. Main	858, 915	— v. Cumberlege	560
— v. Milne	560, 561	— v. Egmont (Lord)	967
— v. Mower	477, 844, 845, 853	— v. Pollhill	442, 488, 953, 954, 967
— v. Petchell	651	Waring v. Coventry	99, 488
— v. Richardson	545	— v. Lee	403, 404
— v. Shore	803, 804	Warmstrey v. Tanfield	365
— v. Walker	77	Warren v. Rudall	89, 110, 566, 872
Wall v. Bright	997, 999, 1000	— v. Travers	613, 619
— v. Wall	67	Warrick v. Queen's College, Oxford	143, 185
Wallace v. Anderson	977	Warrington v. Warrington	901
— v. King	326	Warter v. Hutchinson	837
Wallaston v. King	415	Warwick v. Noakes	300
Waller v. Manchester (Mayor of)	199	Wastell v. Leslie	99
Wallis v. Freestone	488	Wastneys v. Chappell	53, 56
— v. Harrison	171	Waterer v. Waterer	887
Walmesley v. Cooper	331	Waterhouse v. Holmes	554, 559
— v. Foxall	887	Waterlow v. Bacon	171, 230
Walmsley v. Jowett	382	Watkins v. Cheek	858
— v. Vaghan	644	— v. Frederick	354, 358
Walpole (Lord) v. Cholmondeley (Earl of)	926	Watkins v. Williams	973
Walrond v. Pollard	262	Watmough's Trusts, In re	555
Walsh v. Gladstone	539, 542, 585	Watson's Trusts, Re	759
— v. Lincoln (Bishop of)	282	Watson v. Foxon	657, 658, 660
— v. Studdert	55, 56	— v. Hayes	849
Walsingham's Case	715	— v. Hinsworth Hospital	971
		— v. Main	323
		— v. Pearson	355
		— v. Spratley	561
		— v. Watson	84, 803

	PAGE		PAGE
Watt v. Creyke	417	West v. Shuttleworth 541, 542,	543
— v. Wood	517	— v. West	848, 852
Watts v. Ball	61, 64, 365	West Cumberland Iron and	
— v. Kelson 174, 176,	205	Steel Company v. Kenyon..	198
— v. Ognell	17	Westcott v. Culliford	666
— v. Symes 958, 964,	965	Westfaling v. Westfaling	275
Way v. East	547	Western v. Macdermot	204
Weakley v. Rugg	655	Westham Charities, In re	583
Weale v. Lower	754	Westminster Brymbo Coal	
— v. Ollive	973	Company v. Clayton	229
Weatherall v. Thornburgh ..	512	Weston v. Arnold	229, 232
Weatherley v. Ross	235	Westwood v. Cowne	326
Weaver v. Maule	778	— v. Southey 693, 849	
Webb v. Bird	189, 204	Wetherell v. Wetherell.. 477,	853
— v. Byng	274, 676, 935	Whaley v. Laing	200
— v. Herring 719, 720,	834	Whalley, Ex parte	58
— v. Paternoster 172,	231	Wharton, In re	791
— v. Russell	333	Wharton v. Naylor	317
— v. Sadler . . 408, 412, 420,	422	— v. Wharton	754
— v. Shaftesbury (Lord) ..	380	Wheate v. Hall	393
— v. Webb	88, 510, 512	Wheeler v. Branscombe	300
Webber v. Corbett	938	— v. Sheer	572
— v. Stanley	929	— v. Smith	564
Webster, Ex parte	794	— v. Tootel	306
Webster's Case	889	Whicker v. Hume	536, 566
Webster v. Boddington	476	Whiskon v. Cleyton 726,	727
— v. Parr 654, 655, 693,	862	Whistler's Case	256
Weeks v. Heward	192	Whistler v. Webster	415
— v. Stacker	141	Whitacre, Ex parte, In the	
Welch v. Myers	323	matter of Vallis, an Infant	995
Welcome v. Upton	140	Whitaker v. Forbes	312
Weld v. Bradbury	802	— v. Wisbey	792
— v. Hornby	220	Whitbread v. St. John .. 805,	807
Wellbeloved v. Jones 584,	585	— v. Smith	99
Wellcoke and Hammond's Case	638	White's Trusts, Re	896
Weller v. Ker	378	White v. Barber	667, 668
Wellesley v. Wellesley	116	— v. Bass	173, 174
Wellington v. Wellington	687	— v. Bayley	14
Wells's Estate, In re	928	— v. Baylor	777
Wells v. London, Tilbury, &c.		— v. Briggs	493, 888
Railway Company 229		— v. Chitty	981
— v. Malins	493	— v. Coleman	135, 136
— v. Ody	225, 229	— v. Coram	724
— v. Percy	131, 133	— v. Evans	559
— v. Watling	144	— v. Hill	653
— v. Wells	936, 938	— v. James	328
Wentworth v. Wentworth	82	— v. Leeson	170
— v. Wright	261	— v. McCann	110
West, Ex parte	911	— v. Parker	354, 356
West v. Berney 377, 389,	412	— v. St. Barbe	412
— v. Ennissey	661	— v. Simpson	296
— v. Fritche	16	— v. Smale	328
— v. Hedges	317	— v. White .. 90, 94, 95, 103,	
— v. Knight	535		536, 573

	PAGE		PAGE
White & Hindle's Contract, In		Wilder v. Speer	324
Re	601, 602	Wildes v. Davies	512, 516
Whiteacre <i>d.</i> Boulton v. Symonds	33	Wilford's Estate, In re	<i>Add.</i>
Whitehead v. Parkes	196, 223	Wilkes's Case	791
— v. Whitehead	310	Wilkes v. Collin	957
Whitehouse v. Birmingham		— v. Leuson	342
Canal Company	211	— v. Williams	646, 647
Whitelock v. Heddon	801	Wilkins v. Perratt	342
— v. Hutchinson	129	Wilkinson, In re	780
Whitfield v. Prickett	980	— v. Adam	920, 928, 930, 931, 933
Whitfield v. Bewit	111	— v. Barber	558, 561
— v. Pindar	302	— v. Calvert	34
Whiting v. Force	847	— v. Candlish	300
— v. Welkings	720	— v. Chapman	724, 725
Whitney v. Wilkinson	752	— v. Colley	11, 30
Whitlock's Case	300, 373	— v. Duncan	476, 485
Whitlock v. Harding	726	— v. Hall	14
— v. Huntwell	884	— v. Lindgren	539, 573
Whitmarsh v. Robertson	379, 391	— v. Malin	12, 579
Whitmore v. Humphries	150	— v. South	450, 451, 692
— v. Mason	983, 984	— v. White	780
Whitsitt's Estate, In re	53	— v. Wilkinson	978, 980, 982
Whittaker v. Hales	16	Willes v. Douglas	898
Whitter v. Brembridge	839	Willet v. Sandford	553, 564
Whittingham's Case	780	Willett v. Earle	300
Whorwood v. University Col-		Williams, In re	582, 981
lege, Oxford	567	— v. Bagnal	210
Whyte, In re	100	— v. Bolton (Duke of)	112
Wickham v. Bath (Marq. of)	544, 547	— v. Browne	660
— v. Hawker	170, 295	— v. Chitty	77, 873, 874, 916
— v. Lee	11	— v. Clarke	845, 846
— v. Wickham	113	— v. Haythorne	843, 844
— v. Wing	387, 388, 982	— v. Hayward	312
Wicks v. Hunt	227	— v. Hensman	888, 892, 893
Widlake v. Harding	726	— v. Holmes	315
Widmore v. The Governors of		— v. James	223
Queen Anne's Bounty	521, 523	— v. Jekyl	888
— v. Woodroffe	537, 557, 558	— v. Jersey (Earl of)	171
Wigford v. Gill	224	— v. Jones	873, 908, 916
Wigg v. Nicholl	562	— v. Kershaw	540, 562, 582,
— v. Wigg	909	— v. Lewis	509, 862
Wigglesworth v. Dallison	35	— v. Morland	193
Wight v. Leigh	653, 654, 725	— v. Nixon	509
Wigsell v. Wigsell	953, 954	— v. Roberts	319, 323
Wigson v. Garrett	388	— v. Russell	844
Wilcock's Settlement, In re	974	— v. Stiven	320
Wilcocks v. Wilcocks	78	— v. Teale	466, 493, 494
Wilcox v. Bellairs	613	— v. Williams	59, 112
WILD'S CASE	669	Williamson v. Naylor	905
—	258, 672, 673, 674, 675, 676, 677, 753	Willing v. Baine	873, 887, 915
Wild v. Reynolds	917	Willingale v. Maitland	135
Wilde v. Minsterley	207, 213	Willion v. Berkeley	779
Wilder's Trusts, Re	899, 907	Willis v. Brown	538

	PAGE		PAGE
Willis v. Hiscox ..	622, 752, 971	Winterbottom v. Ingham	14
— v. Lucas	722	Winterton v. Crawford	926
— v. Plaskett	851	Wiscot's Case	889
— v. Shorrall	377	Wisden v. Wisden	728, 917
— v. Willis	77	Wither v. Dean and Chapter of Winchester	106
Wills v. Bourne	562	Withers v. Iseham	158
— v. Palmer	733	— v. Withers	56
— v. Wills	898	Withy v. Mangles	888, 896
Wilmot v. Knowles	352	Wolf v. Hill	112, 113
Wilson v. Bayly	729	Wollaston v. King	486, 487
— v. Bell	892	Wollen v. Andrewes	494, 686
— v. Bennett 1003, 1004, 1006		Wolley v. Jenkins	393, 488
— v. Chesnut	688, 693	Wolverton Mortgaged Estate, In re	937
— v. Dennison	266, 267	Wombwell v. Hanrott ..	413, 644
— v. Greenwood	983	Wood's Estate, In re	92
— v. Hornsby	230	— Settled Estates, In re ..	759
— v. Kershaw	263	— Will, In re	914
— v. Nightingale	322	Wood v. Baron	673, 675, 753
— v. Piggott	662	— v. Beard	23
— v. Squire	583, 929	— v. Drew	465
— v. Stanley	189	— v. Gaynon	110
— v. Townend	234, 235	— v. Hewett	168
— v. Vansittart	678, 679	— v. Leadbitter	171
— v. Waddell	198	— v. Majoribanks	274
— v. Wilson ..	422, 423, 476, 508, 512	— v. Nunn	322
— (Lady) v. Willes	136, 138	— v. Penoyze	847
Wilton v. Dunn	300	— v. Saunders	221, 437
Wilts and Berks Canal Co. v. Swindon Waterworks Co. .	194	— v. Stourbridge Railway Company	220
Wiltshire v. Sidford	217	— v. Sutcliffe	227
Wimbledon and Putney Com- mons Conservators v. Dixon	205, 222	— v. Tate	25
Wincheombe v. Pulleston	245, 248, 279	— v. Veal	182
— v. Winchester (Bishop of)	277	— v. Waud ..	161, 167, 193, 194, 199, 200
Winchester's Case (Marquis of)	768, 769, 790	— v. White	394, 488
Windam's Case	754	— v. Wood	888
Windham v. Love	862	Woodbridge Union v. Colneis.	26
Windsor's Case	263, 264	Woodgate v. Unwin	883, 888
Windsor v. Canterbury (Arch- bishop of)	264	Woodhouse v. Herriek ..	619, 622
— (Dean of) v. Webb ..	776	— v. Meredith	1010
Windus v. Windus	910	Woodhouselee (Lord) v. Dal- rymple	930
Wing v. Angrave	874	Woodley v. Exeter (Bishop of)	261
Wingfield v. Littleton	344	Woodliff v. Drury	342
Winn v. Littleton	993	Woodmeeston v. Walker	974
Winstanley v. Lee	203	Woods v. Townley	800
Winter v. Broekwell 5, 6, 172,	231	Woodward v. Dowse	81
— v. Perratt	735	Woollen v. Tanner	415
— v. Winter	917	Woolmore v. Burrows	493
		Woolridge v. Woolridge ..	407, 414
		Wooton's Estate, In re	97
		Wooton v. Steffenoni	782

[illegible]

LIST OF STATUTES CITED.

	PAGE
9 Hen. III. (Magna Charta).	
c. 6	340
c. 9	568
20 Hen. III. (Statute of Merton).	
c. 1	84
c. 2	103
c. 4 -	140, 141
32 Hen. III. (Statute of Marlebridge)	107
c. 15 -	318
c. 21	329
c. 23	43, 46
3 Edw. I. (Statute of Westminster I.).	
c. 39 (Prescription)	180
5 Edw. I. (Statute of Gloucester)	107, 109
6 Edw. I. c. 5 (Permissive waste)	109
7 Edw. I. st. 2 (De religiosis)	336, 340
13 Edw. I. c. 1 (De donis conditionalibus) -	716, 727, 745, 746, 748
c. 2 (Replevin)	329
s. 2	746
c. 34 (Dower)	67, 80
c. 46 (Common)	140, 141
18 Edw. I. (Quia Emptores)	128, 297, 773
17 Edw. II. st. 1, c. 16 (Estreat)	787
st. 2, c. 16 (De prerogativa regis)	46
25 Edw. III. s. 2 (British subjects)	781
1 Ric. II. c. 9 (Maintenance, &c.)	340
5 Ric. II. c. 8 (Ubi ingressus non datur per legem, &c.)	696
15 Ric. II. c. 2 (Forcible entry) -	696
c. 5 (Mortmain) -	340
c. 6 (Benefice)	260
4 Hen. IV. c. 7 (Merchant strangers)	340
c. 12 (Execution on Statute Merchant)	260
8 Hen. V. n. 15 (Dower of women aliens)	73
8 Hen. VI. c. 16 (Escheat)	794
11 Hen. VI. c. 3 (Real actions) -	340
18 Hen. VI. c. 6 (Crown lands)	794
1 Edw. IV. c. 14 (Superstitious uses)	543
1 Ric. III. c. 1 (Feoffments to uses)	340
1 Hen. VII. c. 1 (Real actions)	340
4 Hen. VII. c. 17 (Wardship)	340
11 Hen. VII. c. 20 (Penal Statutes) -	756
19 Hen. VII. c. 15 (Feoffments to uses) -	340

	PAGE
21 Hen. VIII. c. 13 (Clergy) -	271, 278
23 Hen. VIII. c. 10 (Superstitious uses)	341
26 Hen. VIII. c. 10 (Forfeiture for treason) -	769, 789
c. 13 (High treason)	786
s. 5	787
27 Hen. VIII. c. 10 (Statute of Uses) 75, 335, 336, 338, 339, 340, 341, 352,	353, 364, 464, 769
s. 1 -	343
ss. 6—9 - -	75
c. 16 (Inrolments) -	349, 569
ss. 1, 2, 3	569, 570
c. 28 (Religious houses)-	260
28 Hen. VIII. c. 11 (Emblements)	103
31 Hen. VIII. c. 1 (Partition)	893
c. 13 (Religious houses)	260
32 Hen. VIII. c. 1 (Will) - .	- 670
c. 2 (Limitations)	282, 366
c. 5 (Wills)	352, 464
c. 16, s. 13 (Aliens)-	782
c. 28 (Lease) -	- 499, 503, 754
c. 32 (Recoveries)	893
c. 37 (Arrears of rent)	321
s. 4	321
33 Hen. VIII. c. 20 (Crown lands)	765, 769, 786, 789
c. 39 (Monasteries, &c.), s. 75	- 754
34 & 35 Hen. VIII. c. 1 (Religion) -	352
c. 5 (Wills) -	352, 464, 670
c. 20 (Crown lands)	496, 756
37 Hen. VIII. c. 21 (Religious houses) -	260
1 Edw. VI. c. 12 (Dower), s. 17 - -	- - 80
c. 14 (Superstitious uses) -	- 541
2 & 3 Edw. VI. c. 8 (Crown lands), s. 8 -	- 779
3 & 4 Edw. VI. c. 3 (Common) -	140
5 & 6 Edw. VI. c. 11 (Dower; Treason), s. 9 -	786
s. 13 -	80
c. 12 (Marriage), s. 13	786
1 Mary, st. 2, c. 5 (Limitation of actions)	282
1 & 2 Phil. & Mary, c. 12 (Distress)	323
5 Eliz. c. 4 (Master and servant), s. 3 -	7
13 Eliz. c. 12 (Benefice) - - -	270
ss. 1, 3 - - -	270
s. 8 - - -	271
c. 20 (Benefice) -	268
31 Eliz. c. 6 (Corrupt contract) 243, 245, 248, 276, 277, 281	
s. 4 - - -	- 243
s. 5 - - -	- 243, 276
ss. 6, 8, 9 - - -	276
c. 7 (Erecting of cottages) - -	129

	PAGE
43 Eliz. c. 4 (Charities) - -	535, 538
3 Jac. I. c. 5 (Benefice) - - -	264
21 Jac. I. c. 16 (Limitations) -	366
10 Car. st. II. c. 1 (Ir.) (Enrolments, Ireland), s. 17 - - -	569
c. 6 (Ir.) (Limitations) - - - -	282
12 Car. II. c. 24 (Tenure) - - - -	68, 86, 352, 716, 772
13 & 14 Car. II. c. 4 (Act of Uniformity), s. 6 -	270
16 & 17 Car. II. c. 8 (Dower), s. 4 - - -	84
17 Car. II. c. 3 (Benefice) - - - -	260
c. 7 (Action of replevin) - - - -	330
22 & 23 Car. II. c. 10 (Statute of Distributions) - - -	896
29 Car. II. c. 3 (Statute of Frauds) - - 22, 24, 52, 261, 351,	894
ss. 1, 2 - - - -	22
s. 2 - - - -	22
s. 3 - - - -	27
s. 7 - - - -	366
s. 8 - - - -	366
s. 12 - - - -	52, 53, 56
1 Will. & Mary, c. 8 (Indemnity), s. 7 -	270
c. 18 (Toleration Act) - - -	542
c. 26 (Benefice) - - - -	264
s. 3 - - - -	264
s. 4 - - - -	264
2 Will. & Mary, sess. I. c. 3 (Distrain), s. 2 -	326
c. 5 (Distress), s. 2 -	322, 325
s. 5 - - - -	329
8 & 9 Will. III. c. 31 (Partition)	893
11 & 12 Will. III. c. 6 (Aliens)	783
1 Anne, st. 1, c. 7 (Crown lands), s. 5 - -	794
3 & 4 Anne, c. 6 (Perpetuities) - -	496
c. 18 (Partition), s. 2 -	893
4 Anne, c. 16 (Recoveries), s. 15	351, 352
4 & 5 Anne, c. 16 (Attornment)	40, 311
5 Anne, c. 3 (Perpetuities) - -	496
c. 4 (Perpetuities)	496
6 Anne, c. 18 (Order to produce cestui quo vie)	58
7 Anne, c. 5 (Natural-born subjects)	781
c. 18 (Advowson) -	282
c. 19 (Trusts and mortgage estate)	986
8 Anne, c. 14 (Security of rents) -	20
s. 1	317
s. 2	319
s. 67	320
9 Anne, c. 8 (Ir.) (Security of rents), s. 1 -	317
10 Anne, c. 5 (Natural-born subjects) -	781
12 Anne, st. 2, c. 12 (Ecclesiastical patronage) -	244, 279
s. 2	279
c. 14, s. 1 (Benefice) - - -	264

	PAGE
1 Geo. I. c. 13 (Benefice), s. 2 -	270
st. 2, c. 10 (Benefice), s. 4 -	260
ss. 6, 7 -	273
s. 14 -	259
s. 15 -	259
s. 21 -	260
c. 55 (Papists) -	541
9 Geo. I. c. 7 (Poor) -	545
4 Geo. II. c. 21 (British subject) -	781
s. 2 -	781
c. 28 (Landlord and tenant) -	34, 294, <i>Add.</i>
s. 1 -	34, 35
s. 2 -	298, 312
s. 5 -	293
s. 6 -	333
9 Geo. II. c. 26 (Benefice)	270
c. 36 (Mortmain) - 495, 519, 521, 526, 532, 535, 542, 543, 544, 546,	
547, 548, 549, 550, 551, 557, 558, 566, 568, 569, 570, 576, 587, 776	
s. 1 -	533, 544, 545, 547, 561, 571
s. 2 -	533, 572
s. 3 -	533, 572
ss. 4—6 -	534
s. 5 -	545
11 Geo. II. c. 17 (Advowson), s. 5 -	264
c. 19 (Landlord and tenant) 11, 40, 302, 303, 304, 308, 328	
s. 1 -	319
s. 7 -	323
s. 8 -	318, 324, 325
s. 10 -	324, 325
s. 15 -	288, 301, 303
s. 16 -	34, 312
s. 18 -	34
s. 23 -	329
14 Geo. II. c. 20 (Common recoveries) -	52
s. 9 -	52, 53, 56
17 Geo. II. c. 29 (Foundling Hospital) -	568
25 Geo. II. c. 39 (British subject)	783
26 Geo. II. c. 22 (Mortmain), s. 14	561
29 Geo. II. c. 36 (Common) -	142
31 Geo. II. c. 41 (Inclosure)	142
5 Geo. III. c. 17 (Lease) -	296
6 Geo. III. c. 53 (Treason)	270
12 Geo. III. c. 67 (Marine Society)	568
13 Geo. III. c. 21 (British subjects)	781
s. 2 -	781
c. 81 (Common) - - -	152
15 Geo. III. c. 32 (Erecting of cottages) -	129
17 Geo. III. c. 53 (Benefice), s. 21 -	142

LIST OF STATUTES CITED.

lxxix

	PAGE
19 Geo. III. c. 23 (Bath Infirmary)	- 568
22 Geo. III. c. 83 (Poor relief) -	142
31 Geo. III. c. 32 (Superstitious uses), s. 21	541
34 Geo. III. c. 75 (Crown lands) - - -	794
38 Geo. III. c. 5 (Land tax), s. 17 -	299
39 & 40 Geo. III. c. 88 (Escheat), s. 12 -	778, 794, <i>Add.</i>
c. 93 (Treason) -	80
c. 98 (Thellusson Act) 433, 449, 497, 498, 500, 505, 509, <i>Add.</i>	
s. 1	506, 511
s. 3 -	506
s. 4	506
41 Geo. III. c. 109 (Inclosure) - - -	151, 152, 153
s. 8	230
s. 32 -	151
s. 44	151
42 Geo. III. c. 116 (Charities)	570
s. 50	570
43 Geo. III. c. 107 (Queen Anne's Bounty)	568
c. 108 (Benefice) -	569
51 Geo. III. c. 105 (Royal Naval Asylum)	568
c. 115 (Benefice) -	142
s. 2 -	142
53 Geo. III. c. 141 (Inrolment)	294
c. 160 (Doctrine of the Trinity)	542
54 Geo. III. c. 145 (Dower) - -	67, 788
c. 161 (Duke of Wellington's Annuity)	496
55 Geo. III. c. 184 (Presentations) -	261
c. 192 (Will) -	80, 891
56 Geo. III. c. 50 (Landlord and Tenant), ss. 1, 3, 6	317
57 Geo. III. c. 52 (Landlord and Tenant)	34
c. 93 (Distress)	325
58 Geo. III. c. 45 (Church building)	256, 268
s. 38 -	142
59 Geo. III. c. 12 (Poor law), s. 8	545
c. 13 (Local; Solway Frith, &c. canal)	236, 237
c. 134 (Church building)	256, 268
1 Geo. IV. c. 119 (Insolvent debtors) -	755
3 Geo. IV. c. 72 (Church building)	256
c. 92 (Memorial of grant of annuity)	294
5 Geo. IV. c. 39 (British Museum)	568
c. 103 (Church building)	256
6 Geo. IV. c. 17 (Crown lands)-	794
7 Geo. IV. c. 57 (Insolvent debtors), s. 1	755
c. 75 (Memorial of grant of annuity)	294
7 & 8 Geo. IV. c. 25 (Relief of spiritual persons from penalties)	281
c. 72 (Ecclesiastical Commission)	256
9 Geo. IV. c. 31 (Offences against the person), s. 2	67, 788
c. 85 (Charities) - -	549

	PAGE
9 Geo. IV. c. 94 (Benefice) -	281
s. 1 -	281
ss. 2—6	281
10 Geo. IV. c. 7 (Benefice) -	264, 542, 543
s. 16 -	264
c. 25 (Greenwich Hospital), s. 37 -	568
11 Geo. IV. & 1 Will. IV. c. 46 (Appointments) -	397
c. 47 (Debts) -	742
s. 12	86
c. 65 (Lease) -	55
s. 13 -	55
s. 17 -	755
s. 28	264
1 & 2 Will. IV. c. 38 (Church building)	256
c. 42 (Poor), s. 2 -	142
2 & 3 Will. IV. c. 45 (Parliamentary registration), s. 26	343
c. 71 (Prescription) 138, 189, 191, 204, 213, <i>Add.</i>	
s. 2 -	200, 201
s. 3 -	186
s. 7 -	232
c. 115 (Roman Catholics)	542
3 & 4 Will. IV. c. 9 (Seamen's hospital), ss. 1, 2 -	568
c. 27 (Limitations) 10, 17, 81, 99, 282, 333, 334, 366, 883	
s. 1 -	333, 334
s. 2 -	81, 333, 334
s. 3	81, 333, 334, 893, 894
s. 7	20
s. 8 -	35
s. 12	63, 883
s. 23 -	759
ss. 30, 31	282
s. 32	283
s. 33 -	383
s. 36	114, 282, 312, 881
s. 40 -	99
s. 41	81, 84
c. 71 (Prescription)	180
s. 2	182, 183, 187, 189, 190
s. 3 -	183
ss. 4—8 -	184
c. 74 (Fines and recoveries) 54, 60, 66, 74, 349, 350, 388, 463,	
496, 748, 758, 759, 900, 972	
s. 1 -	392
s. 2 -	392, 756
s. 3 -	392, 756
s. 5	392
s. 15 -	754, 756
ss. 16, 17 -	756

LIST OF STATUTES CITED.

lxxxi

	PAGE
3 & 4 Will. IV. c. 74, s. 18	456, 496
ss. 21, 22 -	756
ss. 22—32	756
s. 32	757
ss. 32—34	- 756
s. 33	756
s. 35	757
s. 36	757
s. 37	757
ss. 38, 39 -	- 757
s. 40	62, 756, 757
ss. 40, 41 -	- 754
s. 41	- 756
ss. 42, 44, 45, 46, 47	757
ss. 48, 49	- 756
ss. 50—54	758
ss. 55—58	755
ss. 55—69	758
ss. 56—73	755
ss. 68—70	78
ss. 70—72	- 758
ss. 71—82	78
s. 72	758
s. 73	756
s. 76	758
s. 77	391
s. 78	391
ss. 79—82	78
c. 87 (Inclosure)	151
c. 104 (Debt)	79, 742, 778, 953
c. 105 (Dower)	68, 72, 79, 745
s. 2	72, 75, 366
s. 3	74
s. 4	69
ss. 4—8	78, 79
s. 9	78, 79
s. 10	78, 79
s. 11	79
s. 13	68
s. 14	69
c. 106 (Inheritance)	61, 729, 731, 732, 736, 740
s. 1	732
s. 2	63, 729, 732
s. 3	733, 734
s. 6	736
s. 7	736
s. 8	737
s. 9	737*, 738

	PAGE
4 & 5 Vict. c. 35, s. 79 -	84, 149
s. 81	149
c. 38 (School site)	142, <i>Add.</i>
s. 16	549
s. 36	142
c. 39 (Advowson)	260, 271
5 & 6 Vict. c. 35 (Charities), s. 73	299, <i>Add.</i>
sch. A. No. 4, rule 9	299
c. 82 (Legacy duty, Ir.), s. 38	588
6 & 7 Vict. c. 23 (Copyhold)	148
c. 37 (Benefice)	256, 569
s. 22	569
c. 54 (Limitation of time), s. 3	283
c. 58 (Admiralty lands), s. 36 -	141
7 & 8 Vict. c. 37 (School site)	142, 544, <i>Add.</i>
c. 45 (Nonconformist)	584
c. 55 (Copyhold)	148
c. 66 (Aliens)	63, 783
s. 3	781
s. 5	782
ss. 6—12	783
s. 16	73, 781
c. 76 (Transfer of property)	66, 86, 350
s. 3	881, 894
s. 7	41
s. 8	337, 345
c. 94 (Mortmain)	256
c. 97 (Charities)	587, 588
s. 15	588
s. 16 -	568
8 & 9 Vict. c. 16 (Companies Clauses)	560
c. 18 (Lands Clauses Consolidation) 84, 87, 142, 211, 212, 237, 311, <i>Add.</i>	
s. 6	228
s. 7	86
s. 69	87, 759
s. 74 -	96
ss. 99—107	144
s. 102	143
s. 119	311
s. 127	153
c. 20 (Railway Clauses Consolidation)	211
s. 78	211
c. 56 (Drainage of lands)	86
c. 70 (Church building)	256
s. 22	583
c. 43 (Museums of art)	568
c. 106 (Contingent remainders, &c.) - 22, 66, 69, 70, 345, 350, 471,	603, 892

	PAGE
8 & 9 Vict. c. 106, s. 2	- 23, 350
s. 3 -	22, 33, 24, 27, 729, 881, 894
s. 4	- 41, 86, 386, 388, 715
s. 8 -	337, 470
s. 9	- - 333
c. 112 (Terms)	66, 72, 774
c. 118 (Inclosure)	151, 152, <i>Add.</i>
s. 52 -	150
ss. 147, 150	881
9 & 10 Vict. c. 59 (Church)	- 543
c. 70 (Inclosure)	151, 152
ss. 9, 10, 11 -	881
c. 73 (Benefice), s. 19 -	967
c. 95 (County Courts), ss. 119, 120	329
s. 122	11, 34
c. 101 (Drainage of lands, &c.)	86
10 & 11 Vict. c. 11 (Drainage of lands)	86
c. 17 (Waterworks clauses)	212
s. 6	212
c. 83 (Aliens)	783
c. 111 (Inclosure)	151, 152
s. 3	150
ss. 4, 6	881
11 & 12 Vict. c. 36 (Accumulation), s. 41	506
c. 99 (Inclosure) -	151, 152
s. 13 -	881
c. 119 (Drainage of lands)	86
12 & 13 Vict. c. 49 (School site), s. 4	544
c. 83 (Inclosure) -	151, 152
ss. 7, 11	881
c. 92, ss. 5, 6 (Pound, &c.)	324
c. 105 (Renewable leasehold conversion)	55, 56
c. 106 (Bankruptcy)	755
s. 70	980
s. 147	268
13 & 14 Vict. c. 31 (Drainage, &c. of land)	86
c. 60 (Trustee Act, 1850)	778, 788, 1002
s. 29	86
s. 46	788, 789, 791
c. 65 (Museums of art, &c.)	568
c. 94 (Benefice), s. 5	271
c. 97 (Legacy)	350
s. 6	350
c. 98	260, 271
ss. 5, 6	271
s. 11	271
14 & 15 Vict. c. 25 (Landlord and tenant)	27, 35, 105, 308
s. 1	27, 35, 85, 105, 307

	PAGE
14 & 15 Vict. c. 25 (Landlord and Tenant), s. 2	317
s. 3	35
c. 53 (Copyholds)	148, 151
c. 97 (Mortmain)	256
ss. 8, 24	569
15 & 16 Vict. c. 3 (Estates of intestates)	784
c. 49 (School site)	- 544
c. 51 (Copyholds)	148, 169
s. 27	149
s. 34	84
s. 45	149
s. 48	149
c. 55 (Trustee Extension Act, 1852), s. 8	789
c. 76 (Landlord and Tenant)	11, 312
s. 210	298, 312
c. 79 (Drainage of lands, &c.)	152
ss. 31, 32	881
16 & 17 Vict. c. 51 (Succession duty)	278
s. 21	759
c. 57 (Copyholds)	148
c. 117 (Land tax), s. 2	967
c. 119 (Loc.—Port Carlisle Dock and Railway Act)	236
c. 137 (Charitable trusts), s. 27	571
ss. 29—40	- 586
ss. 54—60	- 586
17 & 18 Vict. c. 32 (Ecclesiastical Commission)	311
c. 60 (Pound, &c.), s. 1	324
c. 90 (Usury)	294
c. 97 (Inclosure) -	142, 152
s. 5	881
c. 112 (Common), s. 1	142
c. 125 (Common Law Procedure)	114, 328
s. 79	114
18 & 19 Vict. c. 15 (Annuities), ss. 12—14	294
c. 122 (Metropolitan buildings)	215
c. 124 (Charities)	583
s. 35	571
s. 39	586
c. 127 (Union of benefices)	260
19 & 20 Vict. c. 9 (Drainage, &c., of land) -	86
c. 50 (Advowson)	266
c. 55 (Church building)	256
c. 80 (Land tax) -	967
c. 88 (Mortmain)	536
c. 104 (Church building) -	256
c. 108 (County Courts)	329, 330
s. 50	11, 34
ss. 51, 52	- 11

	PAGE
19 & 20 Vict. c. 108, ss. 63—66 (County Courts)	329
s. 67	330
s. 71	329
c. 120	85, 114, 755
s. 11	86, 112
s. 23	759
s. 35	754
20 & 21 Vict. c. 31 (Inclosure)	152
ss. 1—11	881
c. 57 (Married women's reversionary interest)	391
c. 77 (Probate Court, &c.)	85
c. 85 (Divorce Court), s. 26	392
21 & 22 Vict. c. 27, s. 2 (Chancery Amendment)	114, 224, <i>Add.</i>
s. 3	114
c. 42 (Prescription)	183
c. 49, s. 4 (Jews)	265
c. 53 (Copyholds)	148, 151, 881
c. 77 (Leases and Sales of Settled Estates)	755
c. 93 (Legitimacy)	742
c. 94 (Charities)	148, 149
s. 10	148
s. 14	149
22 Vict. c. 27 (Recreation ground)	570
22 & 23 Vict. c. 35 (Law of Property and Trustees' Relief)	377
s. 10	332
s. 13	114
s. 19	732
s. 20	732
s. 21	364
c. 43 (Inclosure)	152
ss. 1—6	153
ss. 10, 11	887
c. 61 (Legitimacy), s. 7	742
23 & 24 Vict. c. 38 (Administrator), s. 7	344
c. 81 (Copyholds)	148, 151
c. 124 (Episcopal and Capitular Estates)	92
c. 126 (Common Law Procedure)	282
ss. 1—3	312
ss. 22, 23, 24	330
s. 26	82, 282
c. 134 (Roman Catholic Charities)	543
s. 3	549
c. 136 (Charities), s. 11	586
c. 142 (Benefice) -	260, 271
c. 145 (Trustees), s. 8	95
c. 152 (Distress for rent, Ireland), s. 51	323
c. 154 (Apportionment)	308
s. 49	98

	PAGE
24 & 25 Vict. c. 9 (Charities)	544, 545, 546, 547, 548, 549, 550, 551
s. 1	544, 548
s. 3	545, 549
s. 4	550, 551
c. 134 (Bankruptcy Act, 1861), s. 192	979
25 & 26 Vict. c. 17 (Charities)	545, 546, 548, 551
s. 2	548
s. 3	549
s. 4	550, 551
s. 5	549
c. 73 (Copyholds)	148, 151
c. 89 (Companies Act, 1862)	318
s. 87	327
s. 163	327
c. 108 (Trustee), ss. 1, 2, 3	114
26 & 27 Vict. c. 106 (Charities)	546
c. 120 (Advowson)	261
c. 125 (Statute Law Revision)	340
27 & 28 Vict. c. 13 (Charities)	551
s. 1	549
ss. 2, 3	551
s. 4	548
c. 45 (Leases and sales of settled estates)	85, 755
c. 112 (Judgments), ss. 1, 2	754
c. 114 (Improvement of land)	86, 87
28 & 29 Vict. c. 112 (Admiralty), s. 1	141
29 & 30 Vict. c. 57 (Charities)	551
ss. 1, 2, 3, 4	552
s. 13	553
c. 122 (Metropolitan commons)	152
30 & 31 Vict. c. 54 (Charities, Ireland)	588
s. 19	588
s. 20	588
c. 59 (Statute Law Revision)	312
c. 133 (Charities, &c.), s. 4	570
s. 5	570
c. 142 (Debt), s. 12	34
s. 13	12, 34
c. 143 (Copyholds)	148
31 & 32 Vict. c. 44 (Charities)	570
s. 3	545
c. 89 (Copyholds)	148
c. 117 (Benefice) -	261
32 & 33 Vict. c. 42 (Irish Church) -	278
c. 46 (Debt)	742
c. 56 (Endowed schools)	587
s. 30	586
ss. 31—52	587
s. 59 -	587

	PAGE
32 & 33 Vict. c. 71 (Bankruptcy), s. 15, subs. 4	268
s. 23	327
s. 25, subs. 4 -	755
s. 34	325
s. 35	325
s. 87	327
c. 83 (Bankruptcy and Insolvency)	268, 979
s. 20	755
c. 94 (New parishes)-	256, 260
33 Vict. c. 14 (Naturalization)	63, 73, 338, 781, 782, 783
s. 2	63, 268
s. 18 -	783
33 & 34 Vict. c. 23 (Forfeiture, &c.)	67, 68, 80, 268, 269
s. 1	-268, 269, 795
ss. 2—4	796
ss. 7, 9	80
ss. 7—10	796
ss. 9 <i>et seqq.</i>	268
ss. 12—17	796
s. 18	268
ss. 18—30	797
c. 34 (Charities)	571
c. 35 (Apportionment)	98, 298, 306, 308, 310
s. 2	308
s. 3	308
s. 4	98, 309
ss. 5—7	309
c. 46 (Irish land)	17
c. 56 (Improvement of land)	86
c. 75 (Elementary education), ss. 19, 20	229
s. 23	578
c. 93 (Married Women's Property), s. 8	60, 61
c. 97 (Stamp Act, 1870)	350
c. 99 (Stamps)	350
c. 102 (Alien)	783
34 Vict. c. 13 (Mortmain), s. 5	570
34 & 35 Vict. c. 43 (Ecclesiastical dilapidations)	278
c. 57 (Local—Metropolitan Commons)	152
c. 79 (Landlord and tenant), ss. 1, 2, 3	315, 316
c. 82 (Church building)	256
c. 84 (Improvement of land), s. 2	87
c. 90 (Benefice)	261
c. 102 (Charities, Ireland), s. 16	588
c. 116 (Statute Law Revision)	142
35 & 36 Vict. c. 24 (Charities)	552
c. 39 (Aliens), s. 1	783, 784
c. 50 (Landlord and Tenant)	294, 316
c. 92 (Constable), s. 13	325
36 & 37 Vict. c. 50 (Church Building)	256, 570

LIST OF STATUTES CITED.

lxxxix

	PAGE
36 & 37 Vict. c. 60 (Quare impedit), sch. 2, 3	282
c. 66 (Judicature Act, 1873), s. 21	269
s. 25, subs. 3	116
subs. 5	<i>Add.</i> and 17
subs. 8	- <i>Add.</i>
subs. 11	116
c. 86 (Elementary education), s. 13	578
37 & 38 Vict. c. 33 (Leases and sales of settled estates)	85, 755
c. 37 (Appointment)	397
c. 57 (Limitation of time)	- 99, 333, 366, 759
s. 1	81
s. 8	99, 958
s. 9	10, 99, 759
c. 78 (Vendor and Purchaser Act, 1874)	1010, 1011
s. 4	- 1011
s. 5	885, 1011
s. 6	587, 1011
38 & 39 Vict. c. 77 (Judicature Act, 1875)	82, 327
c. 86 (Master and servant), s. 17	7
c. 87 (Land Titles and Transfer Act, 1875)	- 1011
s. 48	885, 1011
c. 92 (Agricultural Holdings, England) -	28, 33
s. 51	- 33, 34
s. 52	- 33
s. 56	33
s. 57	- 34
s. 58	34
39 & 40 Vict. c. 18 (Treasury solicitor)-	784
c. 30 (Leases and sales of settled estates)	85, 755
s. 4	- 86
s. 46	85
s. 48	86
s. 57	85
c. 56 (Common), s. 33	881
c. 63 (Landlord and Tenant, Ireland), s. 4	32
c. 69 (Expiring laws continuance)	148, 151
40 & 41 Vict. c. 18 (Settled Estates)	85, 112, 114, 755
ss. 13—16 -	- 114
s. 16	86
ss. 46, 47	754
s. 58	754
c. 33 (Contingent remainders)	70, 337, 345, 363, 474, 605, 803
s. 1	475

ADDENDA ET ERRATA.

The Addenda comprehend the cases reported up to the 31st of May, 1879.

- Page 7, bottom line.—For “3 Eliz.,” read “5 Eliz.”
- Page 15, col. 1, fourteen lines from bottom.—For “*Paisley*,” read “*Parsley*.”
- Page 15, col. 2, eight lines from bottom.—For “*Roe*,” read “*Doe*.”
- Page 54, col. 1, nine lines from the bottom.—After “*Betty v. Elliott*, Ib. 110, n.,” add “In *Croker v. Brady*, 4 L. R., I. 61, there was a lease for lives habendum to the lessee, his heirs and assigns. The lease was conveyed by marriage settlement to trustees, their executors, administrators and assigns, upon trust, after certain life interests, for the children of the marriage, subject to appointment, and in default of appointment, for the children absolutely, but without words of limitation. The children died intestate. It was held, that upon the determination of the life interests the heir-at-law of the children became entitled to the beneficial interest in the lease.”
- Page 58, col. 1, nineteen lines from the bottom.—After “2nd ed.,” add “The order, it seems, will be made where it appears by the applicant’s affidavit that an application has been made to the person being and claiming title to be in possession in respect of the life estate by the person entitled to the estate in remainder, for the production of the *cestui que vie*, and the person so in possession and applied to does not respond to the application, the applicant is, under the statute, entitled to an order for production under it. *In re Owen*, 10 Ch. D. 166.”
- Page 63, col. 1, twenty-one lines from top.—For “c. 16,” read “c. 66.”
- Page 87, col. 1, eight lines from top.—For “8 Vict. c. 13,” read “8 Vict. c. 18.”
- Page 114, col. 1, twenty-five lines from top.—For “c. 19,” read “c. 18.”
- Page 114, col. 2, eight lines from bottom.—For “c. 195,” read “c. 125.”
- Page 115, col. 1, twenty-seven lines from top.—After “*Farrant v. Lovel*,” put “3 Atk.”
- Page 142, col. 1, ten lines from top.—For “4 & 5 Vict. c. 58,” read “4 & 5 Vict. c. 38.”
- Page 142, col. 1, fourteen lines from top.—For “7 & 8 Vict. c. 38,” read “7 & 8 Vict. c. 37.”
- Page 191, col. 1, eighteen lines from the bottom.—After “the right. Ib.,” add, “*Beggan v. M'Donald*, 2 L. R., I. 560.”
- Page 194, col. 2, three lines from the bottom.—After “*Embrey v. Owen*, 6 Exch. 371,” add “In *The Earl of Sandwich v. Great Northern Railway Co.*, 10 Ch. D. 707, a railway company whose line crossed a stream near one of their stations, took water for supplying their engines, and for the general purposes of the station. On a bill filed by a millowner lower down the stream, it appeared that the abstraction of water did no damage in wet weather, and never shortened the working of the mill for more than a few minutes a day, it was held that the company, as riparian owners, were entitled to take a reasonable quantity of water for their purposes, and that in this case the quantity taken was reasonable.”
- Page 198, col. 2, twelve lines from the top.—After “*Crompton v. Lea*, 19 L. R., Eq. 115,” add “Or by the act of a stranger over whom the defendant had no control. *Box v. Jubb*, 4 Ex. D. 76.”
- Page 200, col. 1, twenty-two lines from the bottom.—After “*Hodgkinson v. Ennor*, 4 Best & S. 229,” add “*Rameshur Pershad Narain Singh v. Koonj Behari Pattuk*, 4 App. Ca. 121.”
- Page 205, col. 1, fifteen lines from the top.—After “13 C. B., N. S. 841,” add “And it has been recently decided that the access of air to the chimneys of a building cannot, as against the occupier of neighbouring land, be claimed either as a natural right of property, or as an easement by prescription from the time of legal memory, or by a lost grant, or under the Prescription Act. 2 & 3 Will. 4, c. 71. *Bryant v. Lefever*, 4 C. P. D. 172.”

- Page 225, col. 2, eleven lines from top.—For “*Bradel*,” read “*Beadel*,”
- Page 226, col. 2, four lines from the bottom.—After “*Krehl v. Burrell*, 7 Ch. D. 551,” add “affirmed 11 Ch. D. 146.”
- Page 228, col. 1, twelve lines from the bottom.—After “5 Ch. D. 769,” add “Where the plaintiff has established his right against the defendant to a perpetual injunction, as, for instance, to prevent his obstructing a right of way, the Court has no power under Lord Cairns’ Act (21 & 22 Vict. c. 27), s. 2, to oblige him against his will to accept damages in lieu of the injunction. *Krehl v. Burrell*, 11 Ch. D. 146.”
- Page 230, col. 1, three lines from bottom.—For “41 Geo. 4,” read “41 Geo. 3.”
- Page 230, col. 2, two lines from the top.—After “3 Ir. R. C. L. 52,” add “Under the General Inclosure Act (8 & 9 Vict. c. 118), the words of the 68th section are positive that all roads and ways not set out by the valuer on making his award ‘shall be for ever stopped up and extinguished.’ *Turner v. Crush*, 4 App. Ca. 221.”
- Page 237, col. 1, eleven lines from top.—For “c. 22,” read “c. 13.”
- Page 237, col. 2.—After last line, add “And a public right of way may be extinguished by statute by necessary implication as well as by express words. *Corporation of Falmouth v. Simmons*, 10 Ch. D. 518.”
- Page 275, col. 1, four lines from top.—For “*Cook*,” read “*Cooke*.”
- Page 280, col. 2, nineteen lines from the bottom.—After “*Booth v. Potter*, Cro. Jac. 353,” add “And in a recent case of contract by T., a clerk in holy orders, to indemnify W., who had claimed the right of presentation to a living, against the costs of a litigation to establish that right, provided W. in case of success should present T. to the living, is a corrupt agreement, and cannot be enforced; and, moreover it partakes of the nature of champerty and maintenance. *Littledale v. Thompson*, 4 L. R., I. 43.”
- Page 299, col. 2, thirteen lines from the bottom.—After “*Cumming v. Bedborough*, 15 Mee. & W. 438,” add
 “So it was held that where a tenant had for many years paid the land tax, he could not recover it back from his landlord (*Denby v. Moore*, 1 B. & Ald. 123). It has been recently decided that an agreement, that if the tenant will continue to pay his rent in full, without any deduction in respect of landlord’s property tax paid by him, the landlord will repay to the tenant all sums he has paid or shall pay for the landlord’s property tax, is not invalid as being contrary to the provisions of 5 & 6 Vict. c. 35. *Lamb v. Brewster*, 4 Q. B. D. 220.”
- Page 307, col. 1, twelve lines from top.—For “c. 24,” read “c. 22.”
- Page 309, col. 2, fourteen lines from the bottom.—After “*Sealy v. Stawell*, 2 Ir. R., Eq. 326,” add “And when a term of a liquidating creditor became vested in his trustee, who made an assignment thereof during the current quarter, it was held that the lessor might, under the Apportionment Act, 1870, in an action brought after the expiration of the quarter against the trustee, recover a proportionate part of the quarter’s rent up to the time of the assignment over by him. *Swansea Bank v. Thomas*, 4 Ex. D. 94.”
- Page 313, col. 1, six lines from top.—For “14 C. P.,” read “14 C. B.”
- Page 325, col. 2, six lines from bottom.—For “*Byrant*,” read “*Bryant*.”
- Page 330, col. 1, eighteen lines from the bottom.—After the words “Land. and Ten. 167, 2nd ed.” add “An injunction to restrain a landlord from exercising the legal right of distress may, under the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, subs. 3, be granted, but only upon such terms and conditions as the court shall think just. See *Shaw v. Earl of Jersey*, 4 C. P. D. 120; in which case the tenants, having brought an action against their landlord in order to try his right to the rent, an injunction was granted for a fortnight, to be continued only if the rent was paid into court.”
- Page 333, eight lines from bottom.—For “4 Geo. 2, c. 29,” read “4 Geo. 2, c. 28.”
- Page 361, col. 2, sixteen lines from top.—After “*Wykham*,” insert “v. *Wykham*.”
- Page 377, col. 2, seventeen lines from the bottom.—After “*Willis v. Shorral*, 1 Atk. 474,” add “*Dunne’s Trusts*, 1 L. R., I. 516.”
- Page 449, note (g).—For “39 & 40 Geo. 3, c. 60,” read “39 & 40 Geo. 3, c. 98.”
- Page 478, col. 1, seven lines from bottom.—For “*Macworth*,” read “*Mackworth*.”

- Page 503, nine lines from top.—For "*Tinder*," read "*Trinder*."
- Page 517, col. 1, thirteen lines from top.—For "*Short*," read "*Sturt*."
- Page 549, col. 1, seven lines from bottom.—For "9 Geo. 4," read "9 Geo. 2."
- Page 586, col. 1, twenty-two lines from top.—For "17 & 18 Vict.," read "16 & 17 Vict."
- Page 588, col. 2, twelve lines from the top.—After "*Stewart v. Barton*, 6 Ir. R., Eq. 215," add "*Murland v. Perry*, 3 L. R., I. 135."
- Page 613, col. 1, nineteen lines from top.—For "*Waven*," read "*Waren*."
- Page 617, col. 2, eleven lines from the bottom.—After "*Rhodes v. Rhodes*, 27 Beav. 413," add "*In re Harrison's Estate*, 3 L. R., I. 114."
- Page 647, col. 1, lines ten and eleven from top.—For "2 Dr.," read "3 Dr."
- Page 655, col. 2, twenty lines from the bottom.—After "*Webster v. Parr*, 26 Beav. 236," add—
 "Where after gifts of annuities to persons for their respective lives there is a gift over to the survivor in case he should die without issue in the lifetime of the other, there is no gift by implication to the children of the respective annuitants. *Seymour v. Kilbee*, 3 L. R., I. 33."
- Page 678, col. 1, twenty-three lines from the top.—After "12 W. R. 998," add "See and consider *Newson's Trusts*, 1 L. R., I. 373."
- Page 688, col. 1, four lines from the top.—After "5 Ir. Jur. 245," add "*In re Chinery's Estate*, 1 L. R., I. 296."
- Page 723, col. 2, nineteen lines from the bottom.—After "*Maden v. Taylor*, 11 W. N. 101," add "*Farrow v. Knightly*, 8 Ch. D. 736."
- Page 755, col. 1, twenty-four lines from top.—For "3 & 4 Vict.," read "3 & 4 Will. 4."
- Page 776, col. 1, three lines from bottom.—For "19 Geo. 2," read "9 Geo. 2."
- Page 790, col. 2, five lines from bottom.—For "3 Wils.," read "2 Wils."
- Page 794, col. 2, seven lines from top.—After "39 & 40 Geo. 3," add "c. 88."
- Page 805, col. 1, two lines from the top.—After "*Hagger v. Payne*, 23 Beav. 474," add "*Picken v. Matthews*, 10 Ch. D. 264."
- Page 805, col. 2, eighteen lines from the top.—After "*Mann v. Thompson*, Kay, 638," add "*Rogers v. Mutch*, 10 Ch. D. 25."
- Page 865, col. 1, eight lines from the bottom.—After the words "estate for life," add the words, "*See Comfort v. Brown*, 10 Ch. D. 146, explaining *Herrick v. Franklin*."
- Page 865, col. 2, four lines from bottom.—For "*Butler*," read "*Butter*."
- Page 892, col. 2.—After last line add, "In a recent case leasehold property was given by will to two sisters as joint tenants, and they eventually agreed to bequeath it in trust for the other for life, and for their nieces after the death of the survivor. One sister having died, the survivor made a will giving the property in a different manner. It was held by Hall, V. C., that the agreement between the sisters, carried out by the making of the wills, severed the joint-tenancy, and that the property must be administered on the footing of a tenancy in common. *In re Wilford's Estate*, 11 Ch. D. 267."
- Page 913, c. 2, sixteen lines from bottom.—For "*Nowell*," read "*Howell*."
- Page 928, col. 2, thirteen lines from the bottom.—After "*In re Wells' Estate*, 6 L. R., Eq. 599," add "*Ellis v. Houston*, 10 Ch. D. 236."
- Page 935, col. 1, five lines from the bottom.—After "*Baddeley v. Gingell*, 1 Exch. 319," add "*Jennings v. Jennings*, 1 L. R., I. 552."
- Page 938, col. 2, eleven lines from top.—For "ib.," read "L. R., 6 Ch. App."
- Page 939, col. 2, twelve lines from the bottom.—After "*Garland v. Beverley*, 9 Ch. D. 213," add "*In re Twohill*, 3 L. R., I. 21."
- Page 974, col. 1, twenty-two lines from the top.—After "*In re Wilcocks' Settlement*, 1 Ch. D. 229," add "*Bibbens v. Potter*, 10 Ch. D. 733."
- Page 1011, col. 2, twelve lines from top.—For "c. 17," read "c. 87."

LEADING CASES

ON

REAL PROPERTY, CONVEYANCING,

AND THE

Construction of Wills.

ROUSE'S CASE (a).

—♦—

Mich. 30 Eliz.

[REPORTED OWEN, 27.]

TENANT AT SUFFERANCE.]—*Tenant pur autre vie of a manor continues and holds the same after the death of the cestuy que vie :—Held, that as he came in by right he was, after the death of cestuy que vie, tenant by sufferance, and not a disseisor.*

Semble, that any grants made by him are good, inasmuch as he is dominus pro tempore.

IT was moved in this case, that if tenant for term d'auter vie does continue and hold in his estate after the death of cestuy que vie, if he be a disseisor, and whether in pleading, the plea ought to be seised and not possessed.

Shuttleworth.—He was legally in at first, and therefore cannot be a disseisor, 15 Edw. 4, 41. A freehold could not be gained where he came in by the agreement of the party, and 12 Ass. 22. Where the husband and wife were seised of a freehold, and after were divorced by suit on the woman's part, whereby the woman is to have all the land, yet if the husband continue in possession and dies seised, this descent shall not take away entry, because he was no disseisor.

(a) See *S. C. nom. Rous v. Artois*, 2 Leon. 45; Mo. 236.

Gaudy.—He is tenant at sufferance and no disseisor; and there it was moved, that if tenant at sufferance, or a disseisor, make copies of copyhold lands, if they be good or voidable:

Wilde took here a diversity between a termor that holds over, and a tenant at sufferance; for in the case of a tenant at sufferance, there is no freehold taken from the lessor which the continuance of possession doth not take from him, but where the tenant holds over his term there the freehold is disturbed, and therefore there is a disseisin: but at that present it seemed to the judges that there was no diversity.

Godfrey, however, in the next term moved, that if tenant for another's life held over his estate he had a fee simple; and he granted that it was otherwise in some cases, for if he claim to be tenant at the will of the lessor he shall not gain a fee simple. For Littleton, in his chapter of Releases, 108, saith, that tenant at sufferance is where a man in his own wrong doth convey lands and tenements at the will of him that hath the freehold, and such occupier claimeth nothing but at will. But in this case the tenant claims otherwise than at the will of the lessor, he does not claim anything at the will of the lessor, as in the case of Littleton, but claims to hold over against the will of the lessor, which is no tenancy at sufferance. And 10 Edw. 4, if a man makes a lease at will, and the lessor dies, and he continues and claims fee, the heir shall have a mortdancestor. And 18 Edw. 4, 25, if cestuy que use dies, and the tenant continues in, and the tenant is impleaded, the lessor shall not be received, and the reason is because there is no reversion in him, but the tenant hath it. And 22 Edw. 4, 38, by Hussey, Justice, if a termor holds over his term, there an estate in fee is confessed to be in him by matter of law; but it is a doubt whether he be a disseisor or not, but it seemeth not, for a trespass does not lie against him before regress. And in the 7 Hen. 4, 43, if a guardian holds the possession at the full age of the heir, or tenant for years after his term expired, the estate shall be judged in fee. And in our case he hath not claimed to hold at will, for he hath done contrary, for he hath made copies.

By all the Justices.—If tenant at will, or for years, or at sufferance, make a lease for years, this is a disseisin, and a tenant at will doth thereby gain a freehold, and thereby doth claim a greater estate than he ought, and so it is in this case.

2. Admitting him to be tenant at sufferance, the question is if he may grant copies, and whether they be good; and it seems he may, for no trespass lies against him, because he is dominus pro tempore; and it is not like a copy made by an abator or disseisor, for it hath been adjudged that copies made by them are void; but in this case his act of making copies agrees with the custom, as in *Grisbrook's Case*. If an administrator sells goods, and pays debts with the money, and after he who is executor proves the will, he shall never avoid this sale, for that it was done according to the will, which the executors were compelled to do. So in the 12 H. 6, if a bailly cuts trees and repairs an ancient pale, this is good; and 6 R. 2, if he pays quit rents it is good.

Coke.—He comes in by right, and therefore is tenant at sufferance, and like this case is *Dyer*, 35 H. 8, 57, *Lord Zouche's Case*, where cestuy que use for life, the remainder over in tail, made a lease for the term of the life of the lessee, and died, and the lessee continued his estate, the opinions of the justices of both benches were, that he was but tenant at sufferance.

Popham.—If a manor be devised, and the devisee enters and makes copies, and then the devise is found to be void, yet the copies of surrender made by such devisee are good: but contrary where new or voluntary copies are made by him, 7 Eliz. And in the *Lord Arundel's Case* a feoffment in fee was made of a manor upon condition, the feoffee upon condition grants voluntary copies, those are good.

Atkins, on the contrary, made a difference between a tenant at will and a tenant at sufferance, for a tenant at will shall have aid, but so shall not the other, as in 2 H. 4; and a release to one is good and to the other not, &c. And when he holds over he doth assume an interest which shall not be thought wrongful, for he is neither abator nor disseisor, and therefore dominus; and therefore the copies made by him are good, 4 H. 7, 3. Tenant at sufferance may justify for damage feasant.

And all the Justices held for the plaintiff, and that he that made the copy was but tenant at sufferance, and not disseisor, and that he had no fee. And the judgment was to be entered, unless the defendant showed better matter.

RICHARDSON v. LANGRIDGE.



Nov. 9, 1811.

[REPORTED 4 TAUNT. 128.]

TENANT AT WILL—FROM YEAR TO YEAR.]—*If an agreement be made, to let premises so long as both parties like, and reserving a compensation, accruing de die in diem, and not referable to a year, or any aliquot part of a year, it does not create a holding from year to year, but a tenancy at will, strictly so called.*

And although the tenant has expended money on the improvement of the premises, that does not give him a term to hold until he is indemnified.

If, however, there were a general letting at a yearly rent, though payable half-yearly, or quarterly, and though nothing were said about the duration of the term, it is an implied letting from year to year.

TRESPASS for breaking and entering a stable of the plaintiff, and breaking to pieces the doors and locks, and tearing down, damaging, and destroying the bins, troughs and mangers of the plaintiff, and locking up the stable and expelling the plaintiff from his possession. The defendant pleaded, first, not guilty; secondly, that R. Crossley, being seised in fee of the premises, by indenture demised to the defendant, among other things, the stable, for a term of twenty-one years yet unexpired, by virtue whereof the defendant entered and was possessed, and by reason of such possession justified the acts complained of in the declaration. The plaintiff, confessing the seisin of Crossley and the lease to the defendant, replied that the defendant afterwards and during the said term of twenty-one years, demised to the plaintiff the said stable with the appurtenances, to hold to the plaintiff during a certain term, that is to say, for so long a time as they the plaintiff and the defendant should respectively please, the plaintiff rendering to the defendant a certain compensation between them in that behalf agreed upon for the same, by virtue of which

demise the plaintiff entered and was possessed, until the defendant afterwards and *during the continuance of the said term and interest of* the plaintiff therein of his own wrong committed the said several trespasses. The defendant, apprehending that the demise laid in the plea was descriptive of a holding from year to year, instead of rejoining that he had determined his will, rejoined that he *did not demise* the said stable to the plaintiff in manner and form as the plaintiff had alleged, and tendered issue thereon, in which the plaintiff joined. Upon the trial of this cause, at the Maidstone Summer Assizes 1811, before Lord Ellenborough, C.J., the evidence was, that the defendant having taken a lease of a close of land, and built a shed therein, in August 1810, let the same by parol to the plaintiff, who was a carrier, upon an agreement made without any reference to time, that the plaintiff should convert it into a stable, and that the defendant should have all the dung made by the plaintiff's horses. The plaintiff, after having for some time occupied it in its original state, laid out about six pounds in putting up a rack and manger and converting the building to a stable. About the end of the following April the defendant requested him to leave the premises, and upon his refusing to do it till he could suit himself elsewhere, the defendant, in the plaintiff's absence, and without having given him any written notice to quit, forced open the door, took down the rack and manger and carried it out of the stable, and took and used the manure which had been made upon the premises during the plaintiff's occupation of them, and which was of considerable value. The defendant's counsel contended that the evidence proved a strict tenancy at will (which, though it made good the defendant's case, the plaintiff by his replication himself alleged, and the defendant by his rejoinder denied), and that therefore the defendant was entitled at any time to determine his will, and to enter upon the premises and resume the possession when he pleased, without any notice to quit. The counsel for the plaintiff contended that this must be a yearly holding, or that at all events the defendant, having put the plaintiff into possession and suffered him to contract an expense by erecting a rack and manger, could not countermand the permission at his pleasure; upon the same principle on which, in the case of *Winter v. Brockwell*, 8 East, 308, it was held, that a licence once executed, if it be to do a thing whereby the party incurs expense, cannot be revoked, unless the

grantor tenders to the grantee all the expense which he has incurred in executing the licence. Lord *Ellenborough*, C. J., thought that the demise, being so long as each party should respectively please, warranted the defendant in putting an end to the holding when he pleased, and in evicting the tenant without any notice; whereupon the plaintiff, either not adverting to the terms of his issue, or probably fearing that, though he had literally proved his issue and was entitled to a verdict thereon, the defendant would be entitled to judgment *non obstante veredicto*, submitted to a nonsuit.

Best, Serjt., on this day moved for a rule *nisi* to set aside the nonsuit and have a new trial. He first contended that there was at this day no such estate possible in law as a strict tenancy at will; where no longer term was defined, all was tenancy from year to year. At all events, the taking of the dung was equivalent to an acceptance of rent; and after an acceptance of rent, a half-year's notice to quit was necessary: *Doe d. Shore v. Porter*, 3 T. R. 16. Lord *Kenyon*, C. J., says, "The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences. And in order to obviate them the Courts very early raised an implied contract for a year, and added that the tenant could not be removed at the end of the year without receiving six months' previous notice." *Right d. Cutting v. Darby*, 1 T. R. 163, *Buller*, J., "The reason is (of the rule of law which construes what was formerly a tenancy at will of lands as a tenancy from year to year), that the agreement is a letting for a year at an annual rent: then if the parties consent to go on after that time, it is a letting from year to year." And again, the moment the year began, the defendant had a right to hold to the end of that year; therefore there should have been half a year's notice to quit before the end of the term. He also referred to the case of *Winter v. Brockwell*, 8 East, 308, and urged that at least the tenant, having erected the rack and manger at a considerable expense, was entitled to a term long enough to indemnify him.

Mansfield, C. J.—That case has not the slightest resemblance to the present case. You must find some act of parliament, or some decision of the Courts, that two persons cannot agree to make a tenancy at will. But it is a maxim that *modus et conventio vincunt*

legem. Have you any case where the Courts have declared that there must be a tenancy from year to year, the parties having expressly agreed that the holding shall be so long as both parties please? and of that there is evidence here. You say that Lord *Ellenborough* was of opinion that the evidence did not prove a tenancy for a year: the nonsuit then must have proceeded on the ground that there was such an agreement as the plaintiff has himself stated. Here you speak all along of an indefinite agreement. If there were a general letting at a yearly rent, though payable half-yearly or quarterly, and though nothing were said about the duration of the term, it is an implied letting from year to year. But if two parties agree that the one shall let, and the other shall hold, so long as both parties please, that is a holding at will, and there is nothing to hinder parties from making such an agreement.

Heath, J.—I am of the same opinion. It is said that an indefinite hiring of a servant is an hiring for a year, but those cases do not apply. That presumption is founded upon the universal custom of hiring servants at statute fairs, which is usually for a year (*a*). There is no custom that if a man lets premises to another he shall let them for a year.

Chambre, J., denied the proposition, that at this day there is no such thing as a tenancy at will; the taking of the dung by the landlord gave the tenant no term in the premises. Surely the distinction has been a thousand times taken: a mere general letting is a letting at will; if the lessor accepts yearly rent, or rent measured by any aliquot part of a year, the Courts have said, that is evidence of a taking for a year. That is the old law, and I know not how it has ever come to be changed. The Courts have a great inclination to make every tenancy a holding from year to year, if they can find any foundation for it, but in this case there is none such.

The Court refused the rule.

(*a*) See 3 Eliz. c. 4, s. 3, repealed by 38 & 39 Vict. c. 86, s. 17.

There is a difficulty sometimes in determining by what tenancy a person holds land, whether as tenant at sufferance, tenant at will, or tenant from year to year; this principally arises from the tendency in the decisions of the Courts to raise by construction of law, where possible, an estate by right rather than by wrong, and an estate of certain duration rather than one dependent on mere accident or caprice.

In order to illustrate these remarks, and to examine the decisions of the Courts upon this subject, it is proposed to consider—I. Tenancy at Sufferance; II. Tenancy at Will; and III. Tenancy from Year to Year.

I. *Tenancy at Sufferance.*

A tenancy at sufferance has been defined as the lowest estate which can subsist; it arises where a person has held by a lawful title, and continues the possession after his title has determined, without either the agreement or disagreement of the person then entitled to it. *Watk. Convey. note by Morley, p. 23.* Where, for instance, a tenant *pur autre vie* continues in possession after the death of the *cestui que vie* (*Allen v. Hill, Cro. Eliz. 238; 3 Leon. 153*), or a tenant for life, subject to a condition determining his estate, holds over after breach of the condition (*Allen v. Hill, Cro. Eliz. 238*), or a tenant for years (*Butler v. Duckmanton, Cro. Jac. 169; Doe d. Patrick v. Duke of Beaufort, 6 Exch. 498, 503*), or his assignee or undertenant (*Ib.; Simkin v. Ashurst, 4 Tyrw. 781; 1*

Cr. M. & R. 261), holds over after the expiration of the term, or a tenant from year to year holds over after the determination of the tenancy by notice to quit, or by the death of the lessor, who was only tenant for life (*Doe d. Thomas v. Roberts, 16 M. & W. 780*), or a tenant at will holds over after the determination of the estate by any of the modes hereinafter mentioned (see post, p. 18; *Doe d. Bennett v. Turner, 7 M. & W. 226; 9 M. & W. 643; Doe d. Goody v. Carter, 9 Q. B. 863*); in every such case the person so holding over will be tenant at sufferance. See also *Co. Litt. 57b; Vin. Abr. and Com. Dig. title Estate.*

It seems, however, that the heir of a tenant at sufferance will not succeed his ancestor in the tenancy, because he would not, according to the ordinary definition of the tenancy laid down in *Rouse's Case*, have entered by a lawful title. *Berry v. Goodman, 2 Leon. 147; Doe v. Perkins, 3 Mau. & Sel. 271.*

A mortgagor in possession, as will be hereafter seen, is, in many cases, merely a tenant at sufferance to the mortgagee (see post, p. 14—17).

A tenancy at sufferance arises by implication of law; it cannot originate by contract of the parties (*Watk. Convey. 24*). In *Berry v. Goodman, 2 M. & W. 768*, there was an instrument in these terms,—“I hereby certify that I remain in the house belonging to W. G., on sufferance only, and agree to give him immediate possession at any time he may require.” It was held by the Court of Exchequer ‘not to

amount to an agreement for a tenancy so as to require a stamp.

In some cases no tenancy will arise, although the person holding over may originally have held by a lawful title. Thus, any person holding over against the Crown is an intruder, and not a tenant at sufferance, inasmuch as no laches can be imputed to the Crown for not entering. Co. Litt. 57 b; *Attorney-General v. Andrew*, Hard. 25; *Doe d. Watt v. Morris*, 2 Bing. N. C. 196.

Again, if a guardian after the full age of the heir continues in possession, he is not tenant at sufferance, as he would have been if he had entered under an estate created by a terre-tenant, but an abator, because his estate was created by act of law. Co. Litt. 57 b.

This tenancy cannot be either conveyed, assigned, or demised (*Shopland v. Rydler*, Cro. Jac. 55; and see 3 East, 451), so as to bind any one, except the tenant at sufferance himself.

And moreover since it arises by construction of law and not by contract, and there is no privity between the landlord and tenant, it has consequently been held that a release from the former will not operate to enlarge the estate of the latter. Co. Litt. 270 b, 271 a; *Bulter v. Duckmanton*, Cro. Jac. 169; *Thunder d. Weaver v. Belcher*, 3 East, 449.

In *Rouse's Case* (selected as one of the principal cases at the head of this note) it was held that grants of copyholds made by a mere tenant at sufferance were good, and this does not conflict with what has be-

fore been laid down, that a tenant at sufferance cannot convey his estate, because the validity of grants of copyholds by a tenant at sufferance depends upon their being merely ministerial acts. 1 Scriv. Cop. 96, 97.

This tenancy seems to have originated in a desire of the judges, by implying it between two parties, to prevent *adverse possession* from arising, when a particular estate determined without the knowledge of the person entitled in reversion. Thus if a tenant for a term of years held over after the expiration of the term, time would not, under the statute of 21 James 1, c. 16, begin to run from the end of the term, as the person remaining in possession was in effect a tenant, and did not hold by an adverse title; and under that statute time would only run from the commencement of adverse possession. See *Smartle v. Williams*, 3 Lev. 387; *Roe v. Ferrars*, 2 Bos. & Pul. 542; *Doe v. Hull*, 2 Dowl. & Ry. 38; sed vide *Fishar v. Prosser*, Cowp. 218.

Now, however, sections 1 and 2 of 3 & 4 Will. 4, c. 27, have done away with the doctrine of *non adverse possession*; and except in cases falling within the fifteenth section (which has now generally ceased to have any operation) the question is, whether twenty years have elapsed *since the right accrued, whatever be the nature of the possession*; per Lord Denman, C. J., in *Nepean d. Doe v. Knight*, 2 Mees. & W. 911. See also *Doe v. Gower*, 21 L. J. (Q. B.) 57.

Where a tenancy at will is, by the act of the landlord, converted

into a tenancy at sufferance, still the twenty years must be computed from the expiration of the first year after the commencement of the original tenancy at will; but if a new tenancy at will be created between the parties, then the twenty years will be calculated from the expiration of the first year of such new tenancy. Sug. Prop. Stat. 2nd edit. 57; and see *Doe v. Turner*, 7 M. & W. 226; 9 M. & W. 643; *Doe v. Carter*, 9 Q. B. 863; *Hodgson v. Hooper*, 3 Ell. & Ell. 149; but see and consider *Randall v. Stevens*, 2 Ell. & Bl. 652; *Locke v. Matthews*, 13 C. B., N. S. 753; *Doe d. Goody v. Carter*, 9 Q. B. 863.

The second section of 3 & 4 Will. 4, c. 27, is repealed by sect. 9 of 37 & 38 Vict. c. 57, from the 1st of January, 1879; but an enactment to the same effect is substituted for it, save that twelve years instead of twenty is the period fixed within which land or rent must be recovered after the right of action accrued. Sect. 1.

Remedies of Tenant at Sufferance.

A tenant by sufferance in possession can maintain an action of trespass against a wrongdoer, as mere possession is sufficient for that purpose. *Graham v. Peat*, 1 East, 244.

It was said by Lord Abinger, C. B., that a tenant at sufferance turned out by his landlord without a demand of possession might maintain trespass against him. *Doe d. Harrison v. Murrell*, 8 C. & P. 135.

But although in such case the tenant at sufferance might have maintained an action for assault and battery, the better opinion

seems to be that he could not maintain an action *quare clausum fregit*, because as soon as a person entitled to the possession (as the landlord was in such a case) entered in the assertion of that possession, or, which was exactly the same thing, any other person entered by command of that lawful owner so entitled to possession, the law immediately vested the actual possession in the person who so entered (*Jones v. Chapman*, 2 Exch. 803, 816, 821; *Randall v. Stevens*, 2 Ell. & Bl. 641), so that the person formerly tenant at sufferance had no longer that actual possession essential to the maintenance of an action of trespass.

Moreover, as a tenant at sufferance has no title to the land of which he is possessed, he could not maintain an action of ejectment,—a remedy founded upon title (*Graham v. Peat*, 1 East, 246),—against his landlord turning him out without demanding possession (*Doe d. Harrison v. Murrell*, 8 C. & P. 134), or even against a mere stranger and wrongdoer who entered without any title whatever. *Doe d. Crisp v. Barber*, 2 T. R. 749. But the landlord could not without entry maintain an action of trespass against the tenant, because he came in by a lawful title. *Trevillian v. Andrew*, 5 Mod. 384.

Remedies against Tenant at Sufferance.

Formerly the only mode in which the owner of the estate could proceed against a tenant at sufferance, so as to obtain possession thereof, was by entry upon the land and

ouster of the tenant, or by ejectment, in which entry was supposed (*Doe d. Leeson v. Sayer*, 3 Campb. 8); and after actual entry, but not before, the landlord might proceed by an action of trespass for damages, in which the tenant was bound only to account for the profits of the land so by him detained. 1 Steph. Comm. 294, 7th edit.

The landlord might also sue a tenant at sufferance for use and occupation in respect of the period during which he had held after the determination of his former estate (*Bayley v. Bradley*, 5 C. B. 396, 406; *Hellier v. Sillcox*, 19 L. J., N. S. (Q. B.) 295), but he could not distrain for rent without some evidence of a renewal of the former tenancy. *Alford v. Vickery*, Car. & Marsh. 280; *Jenner v. Clegg*, 1 Mood. & Rob. 213; and see *Sir Moil Finch's Case*, 2 Leon. 143.

The landlord, moreover, was enabled in certain cases to recover *double the yearly value* of the land. See 4 Geo. 2, c. 28, by which every tenant for life or years, or other person claiming under or by collusion with such tenant, who should wilfully hold over after determination of the term, and demand made in writing of delivery of possession by the landlord or him in reversion or remainder, was made liable to the payment of *double the yearly value* of the lands detained. See *Swinfen v. Bacon*, 6 H. & N. 184, 846; *Blatchford v. Cole*, 5 C. B. (N. S.) 514.

It will be observed that this statute only took effect in cases in which the landlord gave notice to quit, and therefore the deficiency was supplied by 11 Geo. 2, c. 19,

which extends the provision for *double rent*, to the holding over, after the *tenant's* giving notice to quit (Co. Litt. 57 b; Harg. note 2). As to these statutes, see *Wilkinson v. Colley*, 5 Burr. 2694; *Cutting v. Derby*, 2 Black. 1075; *Cobb v. Stokes*, 8 East, 358; *Doe v. Roe*, 5 Barn. & Ald. 766; *Messenger v. Armstrong*, 1 T. R. 53; *Doe v. Roe*, 7 Barn. & Cress. 2; *Page v. More*, 15 Q. B. 684.

And now by 15 & 16 Vict. c. 76, when a tenant for years, under a lease or agreement in writing, holds over after the expiration of his term, or a tenant from year to year, under a lease or agreement in writing, holds over after his tenancy has been determined by a regular notice to quit, if the landlord first makes a demand in writing of possession, and obtains the refusal of his tenant to deliver up possession, upon his proceeding in ejectment, the tenant may be compelled to find sureties to pay the costs and damages to be recovered in the action before he will be permitted to defend it. Sect. 213.

In recent times, more summary remedies have been given to landlords against tenants holding over, under 1 & 2 Vict. c. 74, 9 & 10 Vict. c. 95, s. 122, and 19 & 20 Vict. c. 108, ss. 50, 51, 52, which confer jurisdiction upon the County Courts where the value of the premises, or the rent payable in respect thereof, does not exceed 50*l.* per annum, upon which no fine shall have been paid; see also *Wickham v. Lee*, 12 Q. B. 521; *Newton v. Harland*, 1 Man. & Gr. 644; *Pollen v. Brewer*, 7 C. B. (N. S.) 371; 6 Jur., N. S.

509; and as to appeals in such cases, see 30 & 31 Vict. c. 142, s. 13.

A tenant at sufferance is not entitled to emblements. 7 Mees. & W. 235.

II. *Tenancy at Will.*

A tenancy at will may be defined as an estate in land, determinable at the will either of the landlord or tenant (Co. Litt. 55 a). A tenancy at will may be created, as in the principal case of *Richardson v. Langridge*, by express words. Thus in the case put by Littleton "if lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which he is in possession," a tenancy at will is created between the parties (Litt. sect. 68); for the law will imply the lease to be at the will of the lessee, as well as at the will of the lessor. So likewise if the lease be made to have and to hold at the will of the lessee, it will also be at the will of the lessor. And it must always be remembered that a lease at will must in law be a lease at the will of *both* parties. Co. Litt. 55 a. See also *Cudlip v. Rundall*, 4 Mod. 9; *Doe d. Bastow v. Cox*, 17 L. J. (Q. B.) 3; 11 Q. B. 122; *Doe d. Dixie v. Davies*, 7 Exch. 89; *Walker v. Giles*, 6 C. B. 662; *Ley v. Peter*, 3 H. & N. 101, 107, 115; *Bayley v. Fitzmaurice*, 8 Ell. & Bl. 679. A reservation of a yearly or quarterly rent is not inconsistent with a tenancy at will. Litt. sect. 72; *Doe v. Davies*, 7 Exch. 91; 21 L. J. (Exch.) 60; *Doe d. Bastow v. Cox*, 11 Q. B. 122; 17 L. J. (Q. B.) 3; *Walker v. Giles*, 6 C. B. 662.

A tenancy at will may also arise by implication (7 M. & W. 235); and if a person be in possession of land, in which he has no freehold estate, nor tenancy for any certain term, and which nevertheless he holds by the consent of the true owner, that person is tenant at will (2 Smith, L. C. 76 a). Thus where a person is put into possession of property paying no rent, as in the case of a minister put into possession of a house by trustees of a congregation (*Doe v. Jones*, 10 B. & Cress. 718; *R. v. Collett*, Russ. & Ry. C. C. 498; *Wilkinson v. Malin*, 2 Tyrw. 544; *Doe d. Nicholl v. M'Kaeg*, 10 B. & C. 721; *Perry v. Shipway*, 1 Giff. 1; *Collier v. King*, 11 C. B. (N. S.) 14; sed vide *Burton v. Brooks*, 11 C. B. 41; *Doe d. Hollingsworth v. Stennett*, 2 Esp. 716, 717; *Doe d. Lambourn v. Pedgriph*, 4 C. & P. 312); or a person enters under a contract for a purchase (*Right d. Lewis v. Beard*, 13 East, 210; *Doe d. Parker v. Boulton*, 6 M. & S. 148, 150; *Doe d. Stanway v. Rock*, 4 Man. & G. 30; *Doe d. Gray v. Stanion*, 1 M. & W. 695; *Ball v. Cullimore*, 2 Cr., M. & R. 120; *Farrelly v. Robins*, 3 Ir. R. C. L. 284), or for a lease, although he may in the former case have agreed to pay interest (*Doe d. Tomes v. Chamberlaine*, 5 Mees. & W. 14; *Church v. Dalton*, 3 Ir. Com. L. Rep. (N. S.) 4), unless by payment of rent, as we shall hereafter see, he may have raised by construction a tenancy from year to year (*Regnart v. Porter*, 7 Bing. 451; *Doe v. Miller*, 5 C. & P. 595; *Riseley v. Ryle*, 11 Mees. & W. 16); if a person enters as tenant under a

lease which is void (*De Medina v. Polson*, Holt, N. P. C. 47; *Goodtitle d. Galloway v. Herbert*, 4 T. R. 680; *Denn d. Warren v. Fearnside*, 1 Wils. 176; *Segrave v. Barber*, 5 Ir. Com. L. Rep. (N. S.) 67), or a parol agreement for a lease void under the Statute of Frauds (*Ward v. Ryan*, 10 I. R. C. L. 17, reversing *S. C.*, 9 I. R. C. L. 51), or if the owner assents to the possession of tenant at sufferance (*Doe v. Turner*, 7 Mees. & W. 235, 646), he will be a tenant at will.

A person, however, entering into premises as a purchaser, may contract in certain events to hold them as a tenant for a term. See *Yeoman v. Ellison*, 2 L. R., C. P. 681. There an agreement for the sale of a public house for 1,575*l.* contained the following stipulation:—"And inasmuch as it is intended that E. (the purchaser) shall be let into the immediate possession of the hereditaments hereby agreed to be sold, and for the purpose of securing the due performance of the several agreements herein contained, he the said E. hereby admits himself to be tenant from week to week to S. (the vendor), of the hereditaments hereby agreed to be sold, at the weekly rent of 80*l.*, payable in advance." The vendor having failed to make a good title:—It was held by the Court of Queen's Bench, (reversing the decision of a county court judge, who thought that the so-called weekly rent was a mere penalty for the due performance of the agreement for sale,) that the relation of landlord and tenant was thereby created between S. and E.,

and gave the former a right to distrain for the rent.

The decision of a court of equity would doubtless have been in accordance with that of the county court judge.

As a vendor who remains in possession after a conveyance is not necessarily in possession with the consent of the vendee, he will not be a tenant at will. *Tew v. Jones*, 13 Mees. & W. 13.

Unless there be a contract that a tenant at will is to occupy land rent free (*Howard v. Shaw*, 8 Mees. & W. 118, 123), he will be compelled to make compensation in an action for use and occupation (*Ib.* and see *Ibbs v. Richardson*, 9 A. & E. 849); and in the event of his having underlet the land, he would be liable to pay what he had received from his tenant (*Hurly v. Hanrahan*, 1 I. Rep., C. L. 700); but this will not be the case if the occupation has not been beneficial, nor *à fortiori* if it have occasioned loss. *Hearn v. Tomlin*, 1 Peake, N. P. C. 252; *Kirtland v. Pounsett*, 2 Taunt. 145.

It has been recently held, in Ireland, that when a purchaser has entered into possession of land under a contract of sale which is subsequently rescinded, he is not liable to use and occupation during the period between the entry and rescission (*Markey v. Coote*, 10 I. R. C. L. 149). But that if, after rescission, the purchaser remains in possession, he is liable in respect of his subsequent occupation, and it is for the jury to say whether it was the creation of a new tenancy at will containing an implied agreement

on the part of the purchaser to pay a fair compensation for his occupation, or whether the former tenancy had simply been determined without the creation of any new tenancy, and the purchaser had become liable as a trespasser. *Ib.*

Where a party who contracts for the purchase of landed property is prevented from completing the purchase by the vendor failing to make a good title, he is not liable in respect of the time of his holding in the expectation that such title would be made, and the purchase completed (*Winterbottom v. Ingham*, 7 Q. B. 611); but when the contract is at an end, as he still continues tenant at will, he is liable to be sued for compensation. *Howard v. Shaw*, 8 Mees. & W. 118, 123; *Boileau v. Rutlin*, 2 Exch. 665, 676.

An implied contract, however, by a tenant at will to pay rent for use and occupation may, it seems, be rebutted by evidence. See *Corrigan v. Woods*, 1 I. Rep., C. L. 73.

Where there is a tenancy at will at a fixed rent, the landlord has a right to distrain. *Anderson v. The Midland Railway Company*, 30 L. J. (Q. B.) 94.

The question is sometimes raised whether an occupier occupies as tenant or servant—a question which has been much discussed in cases which relate to the law of settlement, and also in those which relate to the franchise.

The result of the cases appears to be that where a person is permitted (allowed, if so minded) to occupy premises by way of reward for his services, or as part payment, his occupation is that of tenant. See

Hughes v. Overseers of Chatham, 5 M. & G. 54; *Parker's Case*, 5 M. & G. 73, 80; *Smith v. The Overseers of Seghill*, 10 Q. B. 422.

But that where his occupation is necessary for the performance of his services, and the occupier is required to reside in the house in order to perform those services, the occupation being strictly auxiliary to the performance of the duties which the occupier has to perform, the occupation is that of a servant. *Dobson v. Jones*, 5 M. & G. 112; *Fox v. Dalby*, 10 L. R., C. P. 285.

And an agent or servant who is allowed to occupy a house belonging to his principal, for the more convenient performance of his duties, acquires no estate therein, although he be also allowed to use the house for carrying on therein an independent business of his own. *White v. Bayley*, 10 C. B. (N. S.) 227; see *S. C.*, in Equity, nom. *Spurgin v. White*, 2 Giff. 473.

Another question also occasionally arises as to what is the interest which *at law* a mortgagor in possession may be considered to hold. It seems that if he be himself in the occupation of the estate, and there be an agreement in the mortgage deed that he is to continue in possession until default in payment of the mortgage money at a certain period, he will be tenant for a term by re-demise (*Wilkinson v. Hall*, 3 Bing. N. S. 508; *Doe d. Lyster v. Goldwin*, 2 Q. B. 143); provided the deed be executed by the mortgagee (*Doe v. Lightfoot*, 8 M. & W. 564); but if the money be not paid at the time fixed, the mortgagor becomes and may be treated as a tenant at

sufferance. "From the day on which the mortgagor fails to redeem his pledge," observes Best, C. J., "the possession belongs to the mortgagee, and there is no more occasion for his requiring that the estate should be delivered up to him before he brings an ejectment, than for a lessor to demand possession on the determination of a term. The situation of a lessee on the expiration of a term, and a mortgagor who has covenanted that the mortgagee may enter on a certain day, is precisely the same." *Doe d. Fisher v. Giles*, 5 Bing. 427; *Doe d. Roby v. Maisey*, 8 B. & C. 767; *Doe d. Parsley v. Day*, 2 Q. B. 147; *Doe d. Snell v. Tom*, 4 Q. B. 615.

The usual proviso in a mortgage deed for quiet enjoyment until default, or that the mortgagor shall hold possession for a certain time, will amount to a re-demise (*Drake v. Munday*, Cro. Car. 207; Bac. Abr. Lease, K.; Shep. Touch. 272), but a mere agreement that the mortgagor is to hold for an uncertain period, dependent upon some future event, such as the giving of notice, will amount to a covenant only and not to a re-demise (*Doe d. Paisley v. Day*, 2 Q. B. 153, 156; *Doe d. Roylance v. Lightfoot*, 8 M. & W. 564; *Gale v. Burnell*, 7 Q. B. 850); as will also mere negative words, that, until default, the mortgagee shall not intermeddle with the possession (*Powseley v. Blackman*, Cro. Jac. 659, and see *S. C.* cited 2 Q. B. 154; *Doe d. Roylance v. Lightfoot*, 8 M. & W. 553; *Rogers v. Grazebrook*, 8 Q. B. 895; *Gale v. Burnell*, 7 Q. B. 850), and a re-demise until default on a certain day may be

made defeasible by notice at an earlier day. *Fenn v. Bittleston*, 7 Exch. 152; *Brierley v. Kendall*, 17 Q. B. 937.

Where there is no express or implied agreement as to the possession amounting to a re-demise, the mortgagor will be tenant at sufferance. *Thunder v. Belcher*, 3 East, 451; *Doe d. Roby v. Maisey*, 8 B. & C. 767; *Melling v. Leak*, 16 C. B. 667; *Doe d. Parsley v. Day*, 2 Q. B. 147; *Gale v. Burnell*, 7 Q. B. 850; *Rogers v. Grazebrook*, 8 Q. B. 895. But upon the mortgagee assenting to his possession, he will be tenant at will. Watk. Convey. by Morley, Coote & Coventry, 14.

A distress, however, for arrears of interest "as for rent," in pursuance of a power in the mortgage deed (*Doe d. Wilkinson v. Goodier*, 10 Q. B. 957, and see *Doe d. Garrod v. Olley*, 12 Ad. & Ell. 481), or the receipt of interest by the mortgagee down to a later time than the day of the demise in the declaration in ejectment (*Doe d. Rogers v. Cadwallader*, 2 B. & Ad. 473; *Doe d. Bowman v. Lewis*, 13 M. & W. 241), will not amount to a recognition of the tenancy.

A tenancy at will between the mortgagor and mortgagee may also be created by the express terms of the mortgage deed, although rents payable half-yearly be reserved to the mortgagee (*Roe d. Dixie v. Davies*, 7 Exch. 89; *Doe d. Bastow v. Cox*, 11 Q. B. 122; *Pinhorn v. Souster*, 8 Exch. 138); and where the mortgage deed has not been executed by the mortgagee, by the attornment and occupation of the mortgagor after the deed has been exe-

cuted by him. *West v. Fritche*, 3 Exch. 216; 18 L. J. (Exch.) 50; *Morton v. Woods*, 3 L. R. (Q. B.) 658.

And where the relation of landlord and tenant at will is created between mortgagee and mortgagor, the latter, after he has attorned, will be estopped from denying the relation of landlord and tenant, and that the legal estate and reversion is in the landlord, and for that reason to dispute the validity of a distress put in by him. See *Morton v. Woods*, 4 L. R. (Q. B.) 293; *West v. Fritche*, 3 Exch. 216; 18 L. J. (Ex.) 50. And as to estoppel, see *Jolly v. Arbutnot*, 4 De G. & J. 224; *Dancer v. Hastings*, 12 B. Moo. 34; 4 Bing. 2.

And the payment of interest under a mortgage deed will not convert the possession of the mortgagor into a tenancy from year to year, requiring six months' notice before the mortgagee could enter into possession. *Turner v. Barnes*, 2 Best & Sm. 435, 452.

The tenancy at will of the mortgagor may be determined in the ordinary modes by which tenancies at will are determined (*Ib.*, and see *Doe d. Davies v. Thomas*, 6 Exch. 854, post, p. 18); as for instance by the entry of the mortgagee, by his demand of possession, or by an assignment of the mortgagee's estate either with the concurrence of, or with notice to, the mortgagor.

By the death either of the mortgagor or mortgagee the tenancy at will would be determined, and in the latter case a tenancy at sufferance; in the former, on the entry of the heir or devisee of the mortgagor

without the consent of the mortgagee, an adverse possession would commence, until, by payment of interest or otherwise, he recognized the title of the mortgagee, whereupon a tenancy at will would arise. *Holland v. Hatton*, Carth. 414; 10 Vin. Abr. 418, pl. 19.

Where there is a stipulation in a deed of mortgage that if the mortgagor should make default, then, or immediately after such default, he should hold the premises as yearly tenant at a fixed rent, payable half-yearly, the mortgagee is not justified, without any notice that he intended to treat him no longer as mortgagor but as tenant, in distraining for a year's rent upon the supposition that a tenancy had been created by the mere default of the mortgagor. See *Clowes v. Hughes*, 5 L. R., Ex. 160.

The mortgagor under an agreement that he shall retain possession until default, and that the mortgagee shall have interest, has no implied authority to let from year to year; hence a mortgagee may recover in ejectment without giving notice to quit, against a tenant who claims under a lease from the mortgagor, granted after the mortgage without privity of the mortgagee (*Keech v. Hall*, Douglas, 21; *Wyse v. Myers*, 4 Ir. Com. L. Rep. (N. S.) 101; *Gibbs v. Cruikshank*, 8 L. R., C. P. 454; *Smith v. Eggington*, 9 L. R. (C. P.) 145); if, however, he recognize the tenants they will become his own, and he cannot treat them as trespassers (*Whittaker v. Hales*, 7 Bing. 322; *Birch v. Wright*, 1 T. R. 378). The mere receipt, however, of interest by the mortgagee,

will not, of itself, amount to a recognition of the tenancy (*Doe d. Rogers v. Cadwallader*, 2 B. & Ad. 473; *Doe d. Bowman v. Lewis*, 13 Mees. & W. 241). See, however, the remarks of Lord Denman in *Evans v. Elliot*, 9 Ad. & Ell. 342.

Where the mortgaged estate is in the occupation of tenants, and there is no agreement in the mortgage deed by which the mortgagor is empowered to receive the rents until default, there does not appear to be any tenancy between the mortgagor or mortgagee, and the former is merely a receiver without liability to account. Watk. Convey. 14, note by Morley; see also *Trent v. Hunt*, 9 Exch. 24, where it is laid down by Alderson, B., as a general principle of law, "that if a lessor, having mortgaged his reversion, is permitted by the mortgagee to continue in the receipt of the rent incident to that reversion, he, during such permission is *presumptione juris* authorized, if it should become necessary, to realize the rent by distress, and to distrain for it in mortgagee's name and as his bailiff." See now the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, subs. 5.

Payment of rents which have become due by tenants to the mortgagor before notice, is good as against the mortgagee (*Watts v. Ognell*, Cro. Jac. 192), but not a payment of rents before they have become due (*De Nicholls v. Saunders*, 5 L. R., C. P. 589). But a prepayment will be good to the amount of the rent which becomes due before notice has been given to the tenant by the mortgagee, although such prepayment will afford no answer

as to the residue *Cook v. Guerra*, 7 L. R., C. P. 132, 136.

It has been held in Ireland that the tenancy arising from the relation of mortgagor and mortgagee is not a tenancy at will within the 69th section of the Irish Land Act, 1870 (33 & 34 Vict. c. 46). *Rice v. McQuade*, 9 I. R., C. L. 101.

Where the *legal estate is in trustees, and the cestui que trust is in possession*, he may, although the owner in equity, be considered at law as tenant at will to the trustees; the same tenancy would probably be raised between their successors, in case of the death of the parties; the possession being referred to an implied agreement. In such cases the right of entry under the 2nd section of the statute 3 & 4 Will. 4, c. 27, accrues only on the determination of such tenancy at will. Watk. Convey. by Morley, Coote & Coventry, 16; *Garrard v. Tuck*, 8 C. B. 231; *Melling v. Leake*, 16 C. B. 669; *Parker v. Carter*, 4 Hare, 400; *Doe d. Jacobs v. Phillips*, 10 Q. B. 130.

Where, however, the cestui que trust is only allowed to receive the rents, or otherwise deal with the estate in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees who choose to allow him to act for them in the management of the estate, and the consequence appears inevitable, that, if the actual occupier is, under such circumstances, permitted to occupy for more than the twenty years prescribed by the statute 3 & 4 Will. 4, c. 27, without paying rent, the result must be, that the trustees lose

their title exactly as in the ordinary case of landlord and tenant. *Melling v. Leake*, 16 C. B. 669; *Doe d. Stanway v. Roek*, C. & M. 549.

As a tenant at will has an estate, and there is a privity between him and his landlord, he can accept a release from him, which a tenant at sufferance, on account of his want of privity, cannot do. Co. Litt. 270 b.

But a tenant at will cannot assign (*Jones v. Clerk*, Hardr. 47; *Dinsdale v. Iles*, 2 Lev. 88; 1 Vent. 247; *Birch v. Wright*, 1 T. R. 382; *Murphy v. Ford*, 5 Ir. Com. L. Rep. (N. S.) 19), nor underlet (*Moss v. Gallimore*, 1 Doug. 279; *Shaw v. Barbor*, Cro. Eliz. 830; *Blunden v. Baugh*, Cro. Car. 302), because he would thereby determine his tenancy; but he might still be treated as tenant by the landlord, unless he have notice of the assignment or underlease (*Pinhorn v. Souster*, 8 Exch. 763; *Melling v. Leake*, 16 C. B. 652, 669; *Murphy v. Ford*, 5 Ir. Com. L. Rep. (N. S.) 23). In fact a tenant at will cannot, as against the landlord to whom he is tenant, constitute another person as tenant at will, but he may make a tenancy at will as against himself (per Patteson, J., in *Doe d. Goody v. Carter*, 9 Q. B. 865), or a lease for years. *Blunden v. Baugh*, Cro. Car. 302.

Although a mere general letting may be considered to create a tenancy at will, nevertheless, as is laid down in the principal case of *Richardson v. Langridge*, the Courts have a great inclination to construe every such letting as creating, by implication, a tenancy from year to year, if they can find a sufficient foundation for it; as, for instance, the acceptance

by the lessor of a yearly rent, or rent measured by any aliquot part of a year, which is considered as evidence of a taking for a year. See post, p. 23.

Determination of Tenancy at Will.

As we have before seen, either party may determine a tenancy at will, we shall now consider in what manner they may do so.

Determination of Will by the Landlord.

The notice from the landlord to the tenant to quit, which is necessary to determine a tenancy from year to year (post, p. 28), is not requisite in order to determine an estate at will. A mere demand of possession made by the landlord or his agent on the land is sufficient (*Doe d. Bastow v. Cox*, 11 Q. B. 122; Co. Litt. 55 b; *Doe d. Tomes v. Chamberlaine*, 5 M. & W. 14; *Doe d. Rogers v. Pullen*, 2 Bing. (N. S.) 749); and in the case of *Doe d. Price v. Price*, 9 Bing. 356, where the attorney of the lessor wrote to the attorney of the lessee at will saying, that unless he paid what he owed, the lessor would, without delay, take measures for recovering the possession of the property, it was held by the Court of Common Pleas, on proof of non-payment, to be a sufficient determination of the will.

A verbal demand of possession from the wife of the tenant at will made on the land has been held to be a determination of the will (*Roe d. Blair v. Street*, 4 Nev. & M. 42; 2 Ad. & Ell. 329), but words spoken from the ground will not determine

the tenancy unless the lessee has notice. Co. Litt. 55 b.

The lessor may also determine the will by actual entry upon the ground, even in the absence of the lessee (Co. Litt. 55 b), also by what amounts to an actual entry. *Locke v. Matthews*, 13 C. B. (N. S.) 753.

It will also be put an end to by various acts from which the dissent of the lessor to the continuance of the tenancy may be implied, as by an ordinary conveyance by the landlord, of which the tenant has notice, or by a feoffment with livery of seisin where notice to the tenant will be implied (*Dinsdale v. Iles*, 2 Lev. 88; *Ball v. Cullimore*, 2 Cr. M. & R. 120; *Doe d. Hindmarch v. Oliver*, 1 C. & K. 543; *Doe d. Dixie v. Davies*, 7 Exch. 89), or an agreement to sell the property to the tenant (*Daniels v. Davison*, 16 Ves. 252); but an ordinary conveyance without actual notice will not affect the tenant until he has notice (*Doe d. Davies v. Thomas*, 6 Exch. 857). Where the lessor became insolvent, the vesting order with knowledge thereof by the tenant was held to be a determination of the will. *Doe d. Davies v. Thomas*, 6 Exch. 854.

A conveyance in fee, made by a third party to the landlord, will not determine a tenancy at will. *Doe d. Goody v. Carter*, 9 Q. B. (N. S.) 863.

Again, the entry of the lessor on the land and his cutting down trees (Co. Litt. 55 b), or putting in his cattle (Ib.), will determine the will, inasmuch as such acts, unless permitted by the contract creating the tenancy, would, if a determination of the tenancy were not implied, put the lessor in the place of a

wrongdoer. *Turner v. Doe d. Bennett*, 9 Mees. & W. 643; also *Doe d. Bennett v. Turner*, 7 Mees. & W. 226.

So if the landlord makes a lease, it will determine the will (*Farrelly v. Robins*, 3 I. R., C. L. 284; *Hogan v. Hand*, 14 Moo. P. C. C. 310); and the lessee will not be estopped from showing the determination of the will, by his having accepted possession from the landlord as caretaker, although it was determined by the landlord's own act (Ib.). And if the landlord makes a lease to commence in futuro, the will determines upon the commencement of the lease. *Dinsdale v. Iles*, Raym. 242; *Hinchman v. Iles*, 1 Ventr. 247.

Where the entry of the landlord, or any act done upon the land, is not inconsistent with the tenancy; as, for instance, if he entered and cut a drain or felled timber with the consent of the tenant (*Turner v. Doe d. Bennett*, 9 Mees. & W. 643), or if he felled timber excepted out of the lease, the will would not thereby be determined (Co. Litt. 55 b, Com. Dig., Estates by Grant, H. 6, H. 7, H. 8). Nor will it be so by the landlord distraining for rent, even although the distress be impounded on the premises (*Doe d. Davies v. Thomas*, 6 Exch. 858). Lord Coke indeed says, that "if the landlord impound the distress on the ground, the will is determined" (Co. Litt. 57 b). This was right at the time Lord Coke wrote, because at that period a landlord could not impound a distress on the ground. Per Martin, B., in *Doe d. Davies v. Thomas*, 6 Exch. 858.

The death of the lessor, or his

outlawry, will determine the tenancy (Co. Litt. 55 b, n. 13, 57 b; 5 Co. Rep. 116 b; *James v. Dean*, 11 Ves. 391; *Hogan v. Hand*, 14 Moo. P.C.C. 310, 326); but this will not be the result of the marriage of a female lessor (Co. Litt. 55 b), nor of the death of her husband after the husband and wife had made a lease at will of the wife's land (Ib.); so where there are two lessors or two lessees, the death of one of the lessors or one of the lessees will not put an end to the tenancy. Co. Litt. 55 b.

Determination of Will by the Tenant.

The lessee may determine the will by saying that he will hold no longer, if he also give up possession but not otherwise. Ib.

He may likewise do so by any act inconsistent with his interest, as by a lease, grant, or an assignment; but the tenancy will not be determined as against the landlord until he has notice. *Doe v. Carter*, 9 Q. B. 865; *Jones v. Clerk*, Hard. 47; *Birch v. Wright*, 1 T. R. 378; *Carpenter v. Colins*, Yelv. 73; *Pinhorn v. Souster*, 8 Exch. 763. See also 1 Co. Litt. 55 b, 57 a; *Murphy v. Ford*, 5 Ir. Com. L. Rep. (N. S.) 19; *Melling v. Leak*, 16 C. B. 652, 669.

This tenancy will also be determined by the death of the tenant (*James v. Dean*, 11 Ves. 391; *Doe d. Stanway v. Rock*, Car. & Mar. 549; *Turner v. Barnes*, 2 Best & Sm. 435, 452); or if he be outlawed (Co. Litt. 55 b, n. 13, 57 a; 5 Co. Rep. 116); attainted for treason (*Denn d. Warren v. Fearnside*, 1 Wils. 176); or commit voluntary

waste. Co. Litt. 55 b; *Countess of Shrewsbury's Case*, 5 Co. Rep. 13 a; Cro. Eliz. 777, 784.

Effect of Determination of a Tenancy at Will—when Tenant at Will is entitled to Emblements.

Where a tenancy at will is determined, the tenant thereupon becomes a mere trespasser, or a tenant at sufferance (per Lord Denman, in *Turner v. Doe d. Bennett*, 9 Mees. & W. 646), and the landlord is justified in removing him from the premises (*Pollen v. Brewer*, 7 C. B. (N. S.) 371); but ejectment cannot be maintained against a tenant at will until after the will has been determined. *Goodtitle d. Galloway v. Herbert*, 4 T. R. 680; *Right d. Lewis v. Beard*, 13 East, 210; *Doe d. Jacobs v. Phillips*, 10 Q. B. 130; *Segrave v. Barber*, 5 Ir. Com. L. Rep. (N. S.) 67.

Where a tenancy at will is determined by the death of the tenant, no distress can be made for rent in arrear at common law, because at common law a distress can only be made during the continuance of the tenancy; nor can a distress be made under the statute 8 Anne, c. 14, because under that act a distress can only be made after the determination of the tenancy, when the tenant is in possession. *Turner v. Barnes*, 2 Best & Sm. 435; *Brown v. Metropolitan Counties, &c. Society*, 1 Ell. & Ell. 832.

With regard to the period within which the right to make an entry or distress, or bring an action to recover land or rent from a tenant at will first accrues, it has been enacted by 3 & 4 Will. 4, c. 27, s. 7, "that

when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent *as tenant at will*, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued, *either* at the determination of such tenancy *or* at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined. *Provided* always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, *within the meaning of this clause*, to his mortgagee or trustee." See Sugd. Prop. Statutes, 2nd edit. 52—59, ante, p. 10; *Day v. Day*, 3 L. R., P. C. C. 751.

As either party may at once determine the tenancy, specific performance of an agreement for a mere tenancy at will will not be enforced. *Browne v. Warner*, 14 Ves. 156.

A tenancy at will may, as we have before seen, be determined by the parties at any time; hence, in the case of a tenancy at will rendering a rent, if the tenancy be determined in any interval between the days on which the rent is payable, the question arises whether any rent is to be paid for occupation since the last rent day. This depends upon the fact by whom the tenancy was determined. Thus it was laid down by Holt, C. J., that "if there be a tenant at will rendering rent quarterly, the lessor may determine his will when he

pleases; but then he will lose all the rent that would be due for the quarter in which he determines his will. So the lessee at will may determine his will when he pleases, but then he must pay the rent for all the quarter in which he determines his will" (*Leighton v. Theed*, 1 Ld. Raym. 707; *S. C.*, 2 Salk. 413; *Layton v. Feild*, 3 Salk. 222); for it would be manifestly unjust that the tenant, after having taken the profits of the land, should be able, by determining the tenancy a few days before the rent became due, to avoid its payment. See *Carpenter v. Collins*, Yelv. 73; Co. Litt. 56 a, note 374.

If the lessor oust the lessee, the latter, or his executors if he die, will, on the determination of the tenancy, be entitled at common law as emblements to crops yielding an annual profit, which he may have sown, although not severed or ripe, except artificial grasses (Co. Litt. 56 a; *Flanagan v. Seaver*, 9 Ir. Ch. Rep. 230). The reason is, that it would be injurious to the commonwealth that land should remain untilled; which would probably be the case, if lessors should, by determining the tenancy, be entitled to the crops (Co. Litt. 55 b). And a lessee will have liberty to come on the land to take off crops (Co. Litt. 56 a), or, within a reasonable time, into a house to take away furniture, after the determination of the tenancy (Ib.; and see Litt. sect. 69); but he is not entitled, after the determination of his tenancy, to retain possession for that purpose. *Doe d. Nicholl v. M'Kacg*, 10 B. & C. 721; 5 Man. & Ry. 620.

But if the lessee at will himself determines the will, and refuses to occupy the ground, he will not be entitled to emblements. Co. Litt. 55 b; *Oland's Case*, 5 Co. 116; *Oland v. Burdwick*, Cro. Eliz. 460; *Bulwer v. Bulwer*, 2 B. & Ald. 470, 471.

Where the tenancy is determined by the death of either party, the tenant or his personal representative is entitled to emblements. Co. Litt. 55 b; Watk. Con. 3, note.

Where a mortgagor is considered a tenant at will, he will not, as in the case of other tenants at will, be entitled to emblements, because the right to emblements arises from the equity recognized by law as subsisting between the parties; and the mortgage debt being a charge which the mortgagor ought to pay, there is no equity for him against the mortgagee, that the emblements should not go in discharge of the debt. Watk. Convey. note by Morley, p. 15, 8th edit.

A lessee at will, in the absence of any contract, is not liable for repairs (*Paine's Case*, 8 Rep. 86 a), nor for permissive waste (Litt. sect. 7; *Lady Shrewsbury's Case*, 5 Rep. 13 b; *Harnett v. Maitland*, 16 M. & W. 257; *Torriano v. Young*, 6 C. & P. 8), though he is so for active or voluntary waste. 1 Co. Litt. 57 a.

A tenancy at will may be converted into a tenancy from year to year, not only by the receipt of rent, but by other means, such as the premises being enjoyed for a year or more under a contract, or when there have been dealings with the parties, equivalent to a payment of the rent, or which amount

to an acknowledgment and undertaking by the person in occupation to pay it. See *Smith v. Byrne*, Batty, 464; *Doe d. Thomas v. Field*, 2 Dowl. P. C. 542; *Fahy v. O'Donnell*, 4 I. R., C. L. 332, 335.

III. Tenancy from Year to Year.

A tenancy at will or at sufferance, as we have already seen, is dependent upon the will of each party. A tenancy from year to year is of certain duration; it may arise either by express contract (as if A. lets land to B. to hold as tenant from year to year), or by implication or construction of law.

A tenancy from year to year may, under the 2nd section of the Statute of Frauds (29 Car. 2, c. 3), be made by parol, if rent to the amount at least of two-thirds of the full value of the thing demised has been reserved to the landlord, such tenancy clearly being "a lease not exceeding the term of three years from the making thereof." Leases for a period exceeding three years from the making thereof, or on which rent to the value before mentioned has not been reserved, being required to be made by writing, otherwise they would operate as leases at will only (see sects. 1, 2); and by 8 & 9 Vict. c. 106, "such leases are void at law, unless made by deed" (sect. 3). They might, however, have been enforced as an agreement in equity. *Parker v. Taswell*, 2 De G. & J. 559; 27 L. J. (Ch.) 812; see also *Martin v. Smith*, 9 L. R., Ex. 50.

A mere option, in an agreement for a year, to the tenant at the end of that term, to remain on for three years or more, need not be under

seal, pursuant to 8 & 9 Vict. c. 106, s. 3, as such an agreement would be considered divisible, and as containing an actual demise for a term of a year only, with a stipulation superadded, giving the tenant an option to remain for a further term of three years or more; but until he has exercised that option, no interest thereunder has passed to him. See *Hand v. Hall*, 2 Ex. D. 355: reversing *S. C.*, *Ib.* 318.

But an agreement in writing for a tenancy from year to year, at a rent less than two-thirds of the annual value, will be void at law under 8 & 9 Vict. c. 106, ss. 2, 3.

Formerly at law an agreement to let at a certain rent, and that the lessor should not turn out the tenant so long as he paid the rent, and did not sell any article injurious to the lessor's business, was held either to purport to be a lease for life, and would then be void as not being creatable, save by deed, or a tenancy from year to year, in which case it was determinable necessarily by either party giving notice (*Doe d. Warner v. Browne*, 8 East, 166). But in equity it was held that a lease was necessary in order to carry out the intention of the parties (*Browne v. Warner*, 14 Ves. 156). And it has been recently laid down by Malins, V.-C., that a tenant who has an agreement with his landlord, that the landlord will not turn him out as long as he pays his rent, has a right to retain possession as long as the landlord's interest exists. If, for instance, the landlord held for a term, the interest of the tenant would continue during the

term. *In re King's Leasehold Estates*, 16 L. R., Eq. 521, 527.

What the rights of the tenant would be if the landlord were tenant in fee is a more difficult question: it might not extend beyond his own life. *Ib.* 527.

In a recent case, however, where there was an agreement to demise to the defendant as tenant from year to year, for so long as he should keep the rent paid, and "as the lessor should have power to let the said premises," it was held that the only legal estate of the defendant was that derived from the entry under the agreement, or from the yearly payment of rent, viz. a tenancy from year to year; and that there was nothing to give the defendant any equitable estate beyond his legal tenancy. *Wood v. Beard*, 2 Ex. D. 30. It must however be remarked, that in this case the defendant's right in equity to the grant of a lease did not arise, as he had not given any notice of a counter-claim.

Tenancies from year to year owe their origin to the inconveniences found to result from tenancies at will, which were only partially remedied by the doctrine of emblements, and the Courts, at a very early period, raised an implied contract for a tenancy from year to year. Thus, as is laid down by Chambre, J., in the principal case of *Richardson v. Langridge*, although a mere general letting is a letting at will, yet if the lessor accepts yearly rent, or rent measured by any aliquot part of a year, the Courts have said that is evidence of a taking from year to year. 13 H.

8, 15; *Doe d. Martin v. Watts*, 7 T. R. 85; *Hunt v. Allgood*, 10 C. B. (N. S.) 253.

So if, as laid down by Mansfield, C. J., there were a general letting at a yearly rent, though payable half-yearly or quarterly, and though nothing were said about the duration of the term, it is an implied letting from year to year. Ante, p. 7.

A person who having entered under an agreement to purchase, which afterwards goes off, or under a lease or an agreement for a lease, which for some cause or other is void, as for instance for non-compliance with the provisions of the Statute of Frauds (29 Car. 2, c. 3), or 8 & 9 Vict. c. 106, s. 3, although at first he would only be a tenant at will, on payment of rent, he may, by presumption or implication of law, become a tenant from year to year. See *Clayton v. Blakey*, 2 Smith's L. C. 5th ed. 97, and note; *Doe d. Martin v. Watts*, 7 T. R. 85; *Doe d. Tucker v. Morse*, 1 Barn. & Ad. 365; *Mann v. Lovejoy*, Ry. & Mood. 355; *Cox v. Bent*, 5 Bing. 185; *Saunders v. Musgrave*, 6 Barn. & Cress. 524; *Chapman v. Towner*, 6 Mees. & W. 100; *Berrey v. Lindley*, 3 Mann. & Gr. 498; *Riseley v. Ryle*, 11 Mees. & W. 16; *Doe d. Thompson v. Amey*, 12 Ad. & Ell. 476; *Mayor of Thetford v. Tyler*, 8 Q. B. 95; *In re Stroud*, 8 C. B. 502; *Doe d. Prior v. Ongley*, 10 C. B. 25; *Martin v. Smith*, 9 L. R., Ex. 50.

The payment, however, of rent in such a case, is only evidence of a tenancy during the period for which it was paid, and if no other

tenancy appear, the presumption is that that tenancy was from year to year. Per Lord Ellenborough, C. J., in *Roe d. Brune v. Prideaux*, 10 East, 187.

Where, however, there is a great disproportion between the rent reserved under a void lease, and the real value, the receipt of such rent will not raise a presumption of a tenancy from year to year, though it may be evidence of an intention of a mistaken notion that the landlord had power to confirm a void lease, and may create a tenancy at will. *Smith v. Widlake*, 3 C. P. D. 10; *Roe d. Brune v. Prideaux*, 10 East, 158; *Denn d. Brune v. Rawlins*, 10 East, 261.

So where a tenant holds over after the expiration of a term, he will, on payment of rent, become a tenant from year to year, subject to the stipulations of the lease, so far as they are applicable to the new relation, while he is tenant from year to year. *Thomas v. Packer*, 1 H. & N. 669; *Furnivall v. Grove*, 8 C. B. (N. S.) 496; *Elliott v. Johnson*, 2 L. R., Q. B. 124; *Nixon v. Darley*, 2 L. R., C. L. 467.

And where a lessee, from year to year, holds over after the expiration of a lease originally granted on a demise made to himself, commencing at a particular period, as, for instance, at Michaelmas, the inference as between him and the lessor who allows him to hold over, and who receives rent as from year to year without any explanation or stipulation (save as to an increase of rent), is that there is a tacit agreement that the lessee should

hold as tenant from year to year according to his former holding, that is to say, as from Michaelmas to Michaelmas. *Kelly v. Patterson*, 9 L. R., C. P. 681, 687.

It is clear that a mere advance of rent will not create a new tenancy. *Ib.*, and see *Delmege v. Mullins*, 9 L. R., C. L. 209.

Where a tenancy is determined on the expiration of the current year, by a notice to quit given to a tenant from year to year, a waiver of the notice will create a new tenancy, taking effect on the expiration of the old one (*Tayleur v. Wildin*, 3 L. R., Exch. 303). *Secus*, where the notice to quit was originally ineffectual, even although, it seems, on its withdrawal the tenant agrees to give up part of the demised premises on a reduction of the rent. *Holme v. Brunskill*, 3 Q. B. D. 495.

Where a demise is determined by the expiration of the landlord's estate, and the tenant continues to hold under the remainderman, paying the same rent, the question whether a term contained in the former tenancy is adopted into the new contract of demise, is a question of fact. *Oakley v. Monck*, 1 L. R., Ex. 159.

And if such tenant continues to hold under the remainderman, and nothing passes between them except the payment and receipt of rent, the new landlord is not bound by a stipulation contained in the lease creating the former tenancy, which is not known to him in fact, nor is according to the custom of the country. *Oakley v. Monck*, 1 L. R.,

Ex. 159; 3 Hurlst. & C. 706; 4 Hurlst. & C. 251.

So, likewise, where a tenant continues to hold after the expiration of his landlord's title, a new tenancy from year to year may be presumed, and neither he nor his undertenant can dispute the title of the landlord. *London & North Western Railway Company v. West*, 2 L. R., C. P. 552.

Where a tenant at will, having entered under a void lease or agreement for a lease, by payment of rent becomes by implication of law a tenant from year to year, he will be considered as holding as tenant from year to year upon all the terms of the lease or agreement not inconsistent with such tenancy from year to year, such as a power for re-entry on non-payment of rent, or the obligation to repair, the crops to be taken by the tenant, and the like. *Richardson v. Gifford*, 1 Ad. & Ell. 52; *Bealc v. Sanders*, 3 Bing., N. C. 850; *Doe d. Thompson v. Amey*, 12 Ad. & Ell. 476; *Doe d. Oldershaw v. Breach*, 6 Esp. 106; *Pistor v. Cater*, 9 M. & W. 315; *Thomas v. Packer*, 1 H. & N. 669; *Brocklington v. Saunders*, 13 W. R. (Q. B.) 46; *Bridges v. Potts*, 17 C. B., N. S. 314; *Martin v. Smith*, 9 L. R., Ex. 50. See also *Crawley v. Price*, 10 L. R., Q. B. 302.

The presumption arising from the payment and acceptance of rent is the same in the case of a corporation as an individual. *Doe d. Pennington v. Tanriere*, 12 Q. B. 998; *Wood v. Tate*, 2 B. & P. (N. R.) 247; *Ecclesiastical Commissioners v. Merral*, 4 L. R., Ex. 162.

Payment of rent must be understood to mean a payment with reference to a yearly holding; for in *Richardson v. Langridge* a party who had paid rent under an agreement of this description, but had not paid it with reference to a year, or any aliquot part of a year, was held nevertheless to be a tenant at will only. Per Parke, B., in *Braythwayte v. Hitchcock*, 10 Mees. & W. 497; *Doe d. Hull v. Wood*, 14 Mees. & W. 687. See also *The Marquis of Camden v. Batterbury*, 5 C. B. (N. S.) 808, 820; 7 C. B. (N. S.) 864.

Although the payment of rent is evidence of the intention of the parties to create a yearly tenancy, nevertheless where it appears by any instrument to be the *express intention* of the parties to create an estate at will, the payment of rent, although under the provisions of the same instrument, will not create an estate from year to year. Thus in *Doe d. Basto v. Cox*, 11 Q. B. 122, where A., under a mortgage deed, agreed to become tenant of B. of the premises demised, "henceforth at the will and pleasure of B., after the rate of 25*l.* 4*s.*, payable quarterly;" it was held by the Court of Queen's Bench, refusing a rule for a new trial, that it was a tenancy at will, and that occupation for the two years, and payment of rent under the agreement, did not make B. tenant from year to year. "This Court," said Denman, C. J., "is desirous of presuming a yearly tenancy in all cases where the express language of the parties does not exclude such a presumption.

Here, however, the parties distinctly say, that the tenancy shall be at the will and pleasure of the lessors." See also *Doe d. Dixie v. Davies*, 7 Exch. 89.

It is competent moreover to either the receiver or payer of rent to prove the circumstances under which the payments of rent were made, and by such circumstances to repel the legal implication which would result from the receipt of rent unexplained. *Doe d. Lord v. Crago*, 6 C. B. 90; *Woodbridge Union v. Colneis*, 13 Q. B. 269; *The Marquis of Camden v. Batterbury*, 5 C. B. (N. S.) 808, 820; 7 C. B. (N. S.) 864.

A tenancy from year to year, created by express contract, will, of course, if a time is fixed for its commencement, commence at such time. If no time is fixed, in the absence of anything to lead to a contrary conclusion, the date of the agreement may be presumed to be the commencement of the tenancy (per Archibald, J., in *Sandill v. Franklin*, 10 L. R. (C. P.) 378); but where it is provided that the first quarterly payment of rent is to be made on one of the usual quarterly days, such provision is a clear indication of intention, that the parties meant that the tenancy should be considered as commencing from the previous usual quarterly day. *Sandill v. Franklin*, 10 L. R., C. P. 377.

In the absence of contract, a term from year to year is assignable (*Botting v. Martin*, 1 Campb. Ca. N. P. 317; *Elliott v. Johnson*, 2 L. R., Q. B. 120), according to

the third section of the Statute of Frauds, by writing (Ib.); and now by deed (8 & 9 Vict. c. 106, s. 3).

It has been decided that equity will not enforce an agreement for a tenancy from year to year, on the ground that legal damages are adequate by way of compensation (*Clayton v. Illingworth*, 10 Hare, 451), but the reason why they should be so in the case of tenancy from year to year, and not in the case of an agreement for a longer term, is not very clear or satisfactory.

It may be here mentioned that a tenancy may be created determinable by a week's notice to quit, but a reasonable time must be allowed after the expiration of the notice for the tenant to remove his goods. *Cornish v. Stubbs*, 5 L. R., C. P. 334, 337; see also *Mellor v. Watkins*, 9 L. R., Q. B. 400.

Determination of a Tenancy from Year to Year.

A tenancy from year to year may be determined—1. By the determination of the interest of the lessor; 2. By surrender; 3. By notice to quit.

1. It is clear that where the interest of a lessor being limited, as that of tenant for life, determines, the tenancy for years thereby also determines (*Symons v. Symons*, 6 Madd. 207); but under 14 & 15 Vict. c. 25, the tenant at rack rent instead of emblements may hold till the end of the current year. Sect. 1.

When, however, the interest of the lessor is sufficient to confer such an estate, a tenancy from year to year will not determine by the

death of the tenant, but will vest in his personal representatives (*Doe d. Shore v. Porter*, 3 T. R. 13; *James v. Dean*, 11 Ves. 391; *Thompson v. Thompson*, 9 Price, 464), and a person taking possession of the property comprised in the lease may be liable as executor de son tort (*Armstrong v. M'Inherheny*, 7 Ir. Com. L. Rep. (N.S.) 296), but has no saleable interest. *Kearney v. Ryan*, 2 L. R., I. 61.

2. A surrender by which the tenancy is determined may be express, in which case, by the 3rd section of the Statute of Frauds (29 Car. 2, c. 21), it must be in writing (*Mollett v. Brayne*, 2 Campb. N. P. C. 103; *Doe v. Ridout*, 5 Taunt. 519; and see *Ronayne v. Sherrard*, 11 L. R., C. L. 146); and now by deed (8 & 9 Vict. c. 106, s. 3).

A surrender by a tenant from year to year to the landlord will not put an end to an undertenancy from year to year created by himself, and the undertenant is entitled to have the usual notice to quit. *Mellor v. Watkins*, 9 L. R., Q. B. 400, 405.

A surrender may also be by act and operation of law (and this is excepted from the Statute of Frauds); as, for instance, where there is a new letting to the tenant incompatible with the existence of his former tenancy. Thus in the case of *Hamerton v. Stead*, 3 B. & C. 478, a tenant from year to year entered into an agreement, during a current year, for a lease to be granted to him and A. B., and from that time A. B. entered and occupied jointly with him, it was

held by the Court of King's Bench that by this agreement, and the *joint occupation* under it, the former tenancy was determined, although the lease contracted for was never granted. See also *Oastler v. Henderson*, 2 Q. B. D. 575. So the acceptance of the custody of a house as caretaker has been held to be a surrender of a tenancy from year to year therein as being inconsistent therewith. *Lambert v. McDonnell*, 15 I. C. L. R. (N. S.) 136.

The result is the same where there is a new letting to a third party with the assent of the original tenant. *McDonnell v. Pope*, 9 Hare, 705; *Davison v. Gent*, 1 H. & N. 744.

An agreement for a new lease, without the creation of a new tenancy, will not operate as a surrender. *Foquet v. Moor*, 7 Exch. 870.

But where there is an agreement between the landlord and the tenant that the tenancy should cease, and that agreement is acted upon by the tenant giving up and the landlord taking possession of the premises, it will amount to a surrender by operation of law. Thus where there was a tenancy from year to year determinable on giving a quarter's notice, a licence from the lessor to the tenant to quit in the middle of the quarter, acted upon by the tenant quitting and the lessor accepting possession, was held to amount to a surrender by operation of law, and the landlord's right to any rent for the whole or any part of the current quarter was destroyed. *Grimman v. Legge*, 8 B. & C. 321;

Furnivall v. Grove, 8 C. B. (N. S.) 496; *Phené v. Popplewell*, 12 C. B. (N. S.) 334; and see *Oastler v. Henderson*, 2 Q. B. D. 575, 580.

An alteration in the landlord's receipts for rent of the names of the occupying tenants does not, unless shown to have been assented to by all the parties interested, afford any evidence from which can be inferred either a change of the tenancy or a transfer of the legal rights. *Bourke v. Bourke*, 8 I. R., C. L. 221.

3. A tenancy from year to year, not coming within the Agricultural Holdings (England) Act (38 & 39 Vict. c. 92), in the absence of any express stipulation (*Doe d. Green v. Baker*, 8 Taunt. 241; *Doe d. Robinson v. Dobell*, 1 Q. B. 806), or local custom implied as part of the contract (*Tyley v. Seed*, Skin. 649; *Roe d. Henderson v. Charnock*, Peake, N. P. 6), may at common law be determined by either party giving to the other a *half-year's* notice to quit before the end of the current year of the tenancy (13 H. 8, 15 b; *Right v. Darby*, 1 T. R. 163), and a customary half-year is sufficient. Thus a notice on the 28th of September to quit on the 25th of March or at Lady-day is sufficient. *Roe d. Durant v. Doe*, 6 Bing. 574; and *Doe v. Kightley*, 7 T. R. 63; *Howard v. Wemsley*, 6 Esp. 53; *Doe d. Mathewson v. Wrightman*, 4 Esp. 6; *Doe d. Harrop v. Green*, 4 Esp. 198.

And where the commencement of a tenancy was on the 29th of September, a notice served on the 26th of March to quit on the 29th of September then next, was held not to be valid. *Morgan v. Davies*, 3 C. P. D. 260.

But the landlord may under an agreement have power to determine the tenancy by a six months' notice to expire at any time. *Bridges v. Potts*, 17 C. B. (N. S.) 314.

And an express stipulation that a tenancy from year to year shall not be determinable at the pleasure of either party giving the regular notice, will be void as being inconsistent with and repugnant to the nature of such an estate. *Doe d. Warner v. Browne*, 8 East, 165; *Holmes v. Day*, 8 I. R., C. L. 235.

A tenancy from year to year, which the law implies after entry under an agreement for a lease or a void lease, can only be determined by the landlord during the term by his giving the usual notice to quit (*Chapman v. Towner*, 6 M. & W. 100); yet it determines at the end of the term without any notice to quit (*Doe d. Tilt v. Stratton*, 4 Bing. 446; *Berrey v. Lindley*, 3 M. & G. 511), though the agreement under which the tenant entered provides for the extension of the term upon certain conditions. *Doe d. Davenish v. Moffatt*, 15 Q. B. 257; see also *Lee v. Smith*, 9 Exch. 662; *Tress v. Savage*, 4 Ell. & Bl. 36.

Notice may be given by parol, unless by agreement it is required to be in writing (*Doe v. Crick*, 5 Esp. N. P. C. 197); it is, however, advisable to give it in writing.

Not only the original landlord but also any person taking under him who for the time being is legally entitled to the immediate reversion of the hereditaments comprised in the tenancy, as assignee, devisee, heir, executor or administrator (*Cole, Eject.* 42), even an infant rever-

sioner (*Maddon d. Baker v. White*, 2 T. R. 159), a mortgagee under a mortgage created *subsequently* to the tenancy (*Burrowes v. Gradin*, 1 Dowl. & L. 213, 218; *Rawson v. Eicke*, 7 Ad. & Ell. 451), may give notice to the tenant to quit; but a mortgagee under a mortgage created before the tenancy cannot do so (*Keech v. Hall*, 1 Doug. 21; 1 Smith, L. C. 579 (7th ed.); *Doe d. Parker v. Boulton*, 6 M. & S. 148; *Miles v. Murphy*, 5 I. R., C. L. 382), unless a new tenancy has been created as between the mortgagor and mortgagee. *Doe d. Hughes v. Bucknell*, 8 C. & P. 566; *Doe d. Whitaker v. Hales*, 7 Bing. 322.

A notice to quit by one of several joint tenants on behalf of all, whether authorized by the others or not, will put an end to the tenancy (*Doe d. Aslin v. Summersett*, 1 Barn. & Ad. 135; *Doe d. Kindersley v. Hughes*, 7 M. & W. 141; *Alford v. Vicery*, Car. & M. 280); a similar notice given by a person authorized by one of the joint tenants will have a like effect (*Doe d. Kindersley v. Hughes*, 7 M. & W. 141), although given in the names of the joint tenants and others. *Doe d. Bailey v. Foster*, 3 C. B. 215.

Where several joint tenants jointly demise from year to year, such of them as give notice to quit may recover their several shares in ejectment on their several demises. *Doe d. Whayman v. Chaplin*, 3 Taunt. 119.

A notice to quit given by one of several tenants in common may be to quit his undivided share (*Cutting v. Derby*, 2 Wm. Black. 1075; *Doe d. Robertson v. Gardiner*, 12 C. B.

323), unless they demise jointly, when a notice by one on behalf of himself and the others would, it seems, be good. *Cole*, Eject. 44.

Notice to quit by one of several executors or administrators on behalf of all will be good unless a joint notice be required in the lease. *Right d. Fisher v. Cuthell*, 5 East, 491.

Churchwardens and overseers of a parish may give notice to a tenant to quit land held from the parish upon an implied tenancy from year to year (*Doe d. Higgs v. Terry*, 4 Ad. & Ell. 274; *Doe d. Hobbs v. Cockell*, 4 Ad. & Ell. 478), as also may trustees for a parish in whom the legal estate is vested. *The Churchwardens of St. Nicholas, Deptford v. Sketchley*, 8 Q. B. 394, overruling *Rumball v. Munt*, ib. 382. See also *Doe d. Bailey v. Foster*, 3 C. B. 215.

Railway companies requiring lands have in general powers conferred upon them to give the ordinary landlord's notice to quit at the end of the current year of the tenancy, in which case the tenant is not entitled to compensation, or they may give six months' notice at any time, in which case the tenant will be entitled to compensation for the value of his unexpired term or interest; but if a railway company, after giving a tenant notice to quit before the expiration of the current year of his tenancy, afterwards allow him to stay until its determination, the tenant will be in the same situation as if a regular landlord's notice had originally been given to him, and he will not, therefore, be entitled to compensation. *Reg. v. The London and Southampton Railway*

Company, 10 Ad. & Ell. 3. See also *Ex parte Nadin*, 17 L. J. (Ch.) 421.

Although a tenant in possession under an agreement for a term was at law only a tenant from year to year (*Doe v. Browne*, 8 East, 165), in Equity he would be considered as tenant for a term of years (*Browne v. Warner*, 14 Ves. 156); and if the land were taken by a company under its compulsory powers, he would be entitled to receive as purchase-money the full value of the term. *In re King's Leasehold Estates*, 16 L. R., Eq. 521; see *Hodges on Railways*, 241, 6th ed.

Notice to quit may be given by an agent, but there is a distinction between a particular and a general agent. Where a notice is given by a particular agent, that is, one holding only a special or limited authority, the agency should appear upon the face of the document itself, and it should be given in the name of the principal or expressly on his behalf. *Doe d. Lyster v. Goldwin*, 2 Q. B. 143, 146; *Buron v. Denman*, 2 Exch. 188; *The Earl of Erne v. Armstrong*, 6 I. R., C. L. 279.

Where, however, a notice to quit is given by a general agent, it is not necessary to its validity that his agency should appear, and he may give notice in his own name. Thus it has been held that a notice given in his own name by a receiver appointed by the Court of Chancery with a general authority to act was a valid notice to quit (*Wilkinson v. Colley*, 5 Burr. 2694; *Doe v. Read*, 12 East, 57). So where the trustees of a marriage settlement left the entire management and control of the trust estates to the tenant for life,

it was held by the Court of Queen's Bench that, being their general agent for such purpose, he had power to give notices to quit, and that they were valid, although given in his own name only. *Jones v. Phipps*, 3 L. R., Q. B. 567.

And a notice to quit signed by the mortgagor alone has been held sufficient to determine a tenancy created before the mortgage where the tenant knew, previously to the service of the notice, that the mortgagor had a general authority from the mortgagee to determine tenancies (*Stackpoole v. Parkinson*, 8 L. R., C. L. 561), even although the notice did not purport on the face of it to be on behalf of the mortgagee. *Ib.*

Notice to quit by a mere receiver of rents will not be sufficient (*Doe d. Mann v. Walters*, 10 B. & C. 626, 633); and where a person is manager of the affairs of a landlord during his absence abroad and receives his rents, he will have no implied authority at law to give notice to quit, but it will be a question of fact for a jury to determine whether he had such authority. *Ib.*

A notice to quit, however, given by an agent of an agent will not be sufficient without a recognition by the principal. *Doe d. Rhodes v. Robinson*, 3 Bing., N. C. 677.

An agent for a landlord ought to have authority to give notice at the time when it begins to operate, as it ought to be such that a tenant may safely act on at the time of receiving it. A notice, therefore, by an unauthorized agent cannot be made good by an adoption of it by the principal after the proper time for giving it. *Doe d. Mann v.*

Walters, 10 B. & C. 626; *Doe d. Lyster v. Goldwin*, 2 Q. B. 143; *Doe d. Rhodes v. Robinson*, 3 Bing., N. C. 677; *Right d. Fisher v. Cuthell*, 5 East, 491, 498.

The Courts will put a liberal construction upon notices to quit, and will hold them good notwithstanding there are inaccuracies therein, if they be not such as would be likely to mislead the tenant (*Doe d. Armstrong v. Wilkinson*, 12 Ad. & Ell. 743; see also *Doe v. Kightley*, 7 T. R. 63; *Doe v. Culliford*, 4 D. & R. 248; *Doe d. Cox v. —*, 4 Esp. 185). But the Court will not, in order to support a notice, put a strained construction on terms which are clear in themselves. *Doe v. Morphet*, 7 Q. B. 577; and see and consider *Mills v. Goff*, 14 Mees. & W. 72.

A notice will be bad if it be merely alternative; as, for instance, where there is a notice to quit, "or that you agree to pay double rent" (per Lord Mansfield, Dougl. 176); but if there be a notice to quit, "or I shall insist on double rent," it is an unqualified notice, and does not give the tenant an option. *Doe d. Matthews v. Jackson*, 1 Doug. 175; *Doe d. Lyster v. Goldwin*, 2 Q. B. 143.

Service of a notice need not be personal; it will be sufficient, for instance, if left with and explained to a servant at the residence of the tenant, though not on the demised premises (*Jones v. Marsh*, 4 T. R. 464; *Doe v. Dunbar*, M. & Malk. 10); even if the evidence show that it did not come into the hands of the tenant (*Tanham v. Nicholson*, 5 L. R., Ho. Lds. 561; affirming

S. C., nom. *Nicholson v. Tanham*, 4 I. R., C. L. 185). Service of a notice will be sufficient if put under the door of a house, if it be shown to have come to the hands of the tenant (*Alford v. Vicery*, Car. & Marsh. 280), or it may be sent through the post (*Papillon v. Brunton*, 5 Hurlst. & N. 518). And in the case of a corporation, it may be served on its officers (*Doe v. Woodman*, 8 East, 228); and service on one of several joint tenants will be sufficient. *Doe v. Watkins*, 7 East, 551; *Doe v. Crick*, 5 Esp. 196.

Notice to one of two or more joint lessees is sufficient (*Doe d. Lord Macartney v. Crick*, 5 Esp. 196; *Doe d. Bradford v. Watkins*, 7 East, 551); and should be given to a corporation aggregate when tenant and not to its officers. *Doe d. Lord Carlisle v. Woodman*, 8 East, 228.

Notice to quit should be given by the landlord to his tenant or to his assignee (*Pleasant d. Hayton v. Benson*, 14 East, 234), and not to a mere undertenant (*Ib.*, and see *Burn v. Phelps*, 1 Stark. R. 94), who ought to be served with notice by the tenant after he has himself received it. *Roe v. Wiggs*, 2 B. & P., N. R. 330.

Notice given to the tenant of a trading concern, as a brewery, will be sufficient, although subsequently to the creation of the tenancy he may have taken others into partnership with him, to whom in common with himself receipts for the rent have been given, inasmuch as that circumstance, in the absence of evidence proving a transfer, did not show the legal estate to be in the

new partners (*Doe d. Green v. Baker*, 8 Taunt. 241); and the lessor to a company, although he may afterwards become a member thereof, may give the company notice to quit. *Francis v. Doe d. Harvey*, 4 M. & W. 331.

The service of notice to quit on the person in possession, in the absence of a legal personal representative of the deceased tenant, is effectual to determine the tenancy, even as against a person subsequently taking out representation. *Rees v. Perrott*, 4 C. & P. 230; *Sweeny v. Sweeny*, 10 I. R., C. L. 375.

In the case of agricultural or pastoral holdings in Ireland, a notice to quit "to the representatives" of the deceased tenant, not naming them, is by recent legislation rendered sufficient. 39 & 40 Vict. c. 63, s. 4.

The lessor by a distress (which is acquiesced in) for rent which has accrued subsequent to the expiration of the notice to quit, will waive any advantage which he may take on account of such notice (*Zouch v. Willingale*, 1 H. Black. 311); but acceptance of (*Goodright v. Cordwent*, 6 T. R. 219; *Doe v. Batten*, Cowp. 243), or demand for, such rent is not necessarily a waiver of notice; it is a question of intention which must be left to the jury (*Blyth v. Dennett*, 13 C. B. 178), and if a distress were not acquiesced in, as if the tenant replevy, it would not be a waiver, inasmuch as there would be no evidence of a new tenancy. *Ib.* 180.

A second notice to quit after the expiration of a former one, if it in

effect recognizes a new tenancy, will be a waiver of the first notice (*Doe v. Palmer*, 16 East, 53); but not if it be served after an ejectment to enforce the former (*Doe v. Humphreys*, 2 East, 237). And it has been held, that if after the expiration of a notice to quit the landlord gives the tenant a fresh notice, that, unless he quit in fourteen days, he will be required to pay double value, the second notice is no waiver of the first, its object being merely the recovery of double value, and a qualified condonation of the trespass (*Doe d. Digby v. Steel*, 3 Campb. N. P. C. 115). So likewise a mere permission to stay for a limited time after the expiration of the notice will not be a waiver. *Whiteacre dem. Boulton v. Symonds*, 10 East, 13.

A disclaimer by a tenant from year to year of the title of his landlord will operate as a waiver by the tenant of the usual notice to quit (*Doe d. Bennett v. Long*, 9 C. & P. 773; *Doe d. Grubb v. Grubb*, 10 B. & C. 816), because a notice to quit is only requisite where a tenancy is admitted on both sides, and if a defendant denies the tenancy there can be no necessity to end that which he says has no existence; per *Best*, C. J., in *Doe d. Calvert v. Frowd*, 4 Bing. 560.

But there may be a waiver of the disclaimer, as where the landlord distrains for subsequent rent (*Doe d. David v. Williams*, 7 C. & P. 322). As to what amounts to a disclaimer, see *Cole on Ejectment*, 41; *Hunt v. Allgood*, 10 C. B. (N. S.) 253; *Jones v. Mills*, 10 C. B. (N. S.) 788.

T.L.C.

Notice to Quit under the Agricultural Holdings (England) Act.

Under the Agricultural Holdings (England) Act (38 & 39 Vict. c. 92), which applies, with some exceptions, to contracts of tenancy beginning after the 14th of February, 1876—the commencement of the act—unless its operation be excluded by the landlord and tenant in writing (sect. 56), a *year's notice* in the case of a tenancy from year to year, expiring with the year of the tenancy, is substituted for the usual half year's notice, except where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors (sect. 51).

The notice to be given by the landlord, with a view to certain uses to be made of the land, in the act mentioned, to be stated in the notice, may relate to part only of the holding; and the tenant may, within 28 days of the notice, serve on the landlord a notice in writing to the effect that he accepts the same as a notice to quit the entire holding at the end of the current year of the tenancy (sect. 52). In the case of a contract of tenancy from year to year or at will, current at the commencement of the act, the act will not apply to the contract, if within two months after the commencement of the act, the landlord or the tenant gives notice in writing to the other to the effect that he (the person giving the notice) desires to terminate the existing contract of tenancy between them shall remain unaffected by the act; but such a notice

D

is revocable by writing, and in the absence of any such notice, or on revocation of every such notice, the act is applicable to the contract. In every other case of a contract of tenancy current at the commencement of the act, the act will not apply to the contract (sect. 57). Nothing, moreover, in the act is applicable to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or that is of less extent than two acres (sect. 58).

It has recently been decided that a yearly tenancy which by express agreement of the parties is determinable on six months' notice to quit, is not within the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), s. 51, which provides that, "where a half year's notice, expiring with the year of tenancy, is *by law* necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this act be necessary and sufficient for the same." *Wilkinson v. Calvert*, 3 C. P. D. 360.

Remedies against Tenants.

If tenants do not give up the premises peaceably, the lessor may sue them either in ejectment or trespass.

As to the remedies under the Small Tenements Act (1 & 2 Vict. c. 74), see Addison on Contracts, 601, 7th ed.

As to the landlord obtaining possession where the tenant has deserted the premises, see 11 Geo. 2, c. 19, s. 16; 57 Geo. 3, c. 52; *Ashcroft v.*

Bourne, 3 Barn. & Ad. 684; *Basten v. Carew*, 3 B. & C. 649; *Reg. v. Traill*, 12 Ad. & Ell. 761; *Reg. v. Sewell*, 8 Q. B. 161; and as to the jurisdiction of the metropolitan police magistrates, see 3 & 4 Vict. c. 84.

A tenant holding over, after notice in writing from his landlord, will, under 4 Geo. 2, c. 28, s. 1, be liable to pay *double the yearly value*, and under 11 Geo. 2, c. 19, s. 18, when he has given notice himself, he will be liable to *double the yearly rent*. For the statutes and the decisions thereon, see 2 Chitt. Stat. 776—780.

Where neither the rent nor the annual value of the premises exceed 50*l.*, without a fine having been paid (*Earl of Harrington v. Ramsay*, 2 Ell. & Bl. 669, on construction of 9 & 10 Vict. c. 95, s. 122), the landlord may obtain a warrant of possession in the county court against a tenant neglecting or refusing to deliver up possession (19 & 20 Vict. c. 108, s. 50); and the Court will have jurisdiction, even though a *bonâ fide* question of title is raised, where neither the annual value of lands nor the rent payable in respect thereof exceed 20*l.* (30 & 31 Vict. c. 142, ss. 12, 13). See Addison on Contracts, 602, 7th ed.

Where a tenant holds over after the expiration of a notice to quit, the landlord is entitled to recover against him the reasonable damages and costs sustained by him in an action at the suit of a party to whom he had contracted to let the premises, but to whom the tenant's wrongful act has prevented him from delivering possession. *Bramley v. Cherterton*, 2 C. B. (N. S.) 592.

A tenant, moreover, under a parol agreement, without any stipulation that he shall deliver up possession of the premises at the end of the term, is nevertheless bound to deliver up complete possession. Therefore, where such a tenant from year to year had underlet part of the premises, and at the determination of both tenancies by notice to quit the undertenant held over against the will of the tenant, it was held that the landlord could recover against the tenant as damages the value of the whole premises for the time he was kept out of possession, and also the costs of ejecting the undertenant. *Henderson v. Squire*, 4 L. R., Q. B. 170.

The act, however, of 4 Geo. 2, c. 28, s. 1, is not applicable if the holding over is not wilful and contumacious, but *bonâ fide* and by mistake. *Wright v. Smith*, 5 Esp. 203, 215; *Soulsby v. Neving*, 9 East, 310, 313; *Swinfen v. Bacon*, 6 Hurlst. & Norm. 184, 846.

As tenants from year to year have as certain an estate, while it lasts, in the lands they occupy, as those who hold for a longer term, it follows that they were entitled to emblements like tenants for years, where their tenancy was determined by the happening of an uncertain event, over which they had no control (*Kingsbury v. Collins*, 4 Bing. 207, 12 Moore, 429); but it might be otherwise when they themselves put an end to the tenancy, or where, by means of a notice to quit or otherwise, the period of determination had been ascertained (*Woodf. Land.*

& Ten. 503, 5th ed.). However, now, by 14 & 15 Viet. c. 25, on the determination of a lease or tenancy at rack rent under any landlord entitled for his life, or for any other uncertain interest, instead of emblements, the tenant is to hold until the end of the current year.

Where there is a right to emblements which, though small, is not frivolous, the case is within the act. See *Haines v. Welch*, 4 L. R., C. P. 91, where it was held that the act was applicable to a cottage with about an acre of land, partly cultivated as a garden and partly sown with corn and potatoes, as being a farm or lands within sect. 3. See also *Kenna v. Nugent*, 7 I. R., C. L. 464.

It has also been held that under sect. 1 of 14 & 15 Vict. c. 25, there is a right to distrain for the rent due since the death of the tenant for life as well as to recover it by action. *Haines v. Welch*, 4 L. R., C. P. 91.

As to the tenant's right to the away-going crops by custom, see *Wigglesworth v. Dallison*, 1 Smith's L. C. 598, 7th ed., and note; Addison on Contracts, 603, 7th ed.; and as to fixtures, see *Elves v. Maue*, 2 Smith's L. C. 162, 7th ed., and note; *Leader v. Homewood*, 5 C. B. (N. S.) 546.

With regard to the period within which the right to make an entry or distress, or to bring an action to recover land or rent as against a tenant from year to year, shall be deemed to have first accrued, it has been enacted by 3 & 4 Will. 4, c. 27,

s. 8, "that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued *at* the determination of the first of such years or other periods, *or* at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)." See Sugd. Prop. Stat. 59, 2nd edit.

LEWIS BOWLES'S CASE (*a*).*Pasch.* 13 *Jac.* 1.

[REPORTED 11 Co. 79 b.]

ESTATES FOR LIFE—THEIR INCIDENTS.]—*Covenant to stand seised, in consideration of an intended marriage, to the use of T. and A., his intended wife, for their lives, without impeachment of waste; and after their decease, to the use of the first issue male, and to the heirs male of such issue, lawfully begotten, and so on to the second, third, &c., issue male, remainder to the use of the heirs male of T. and A., and for want of such issue, to the use of B. and the heirs male of his body, remainder to the heirs of the body of T. and A. The marriage took place, T. died, leaving issue by A., J., who afterwards died. Resolved—*

1. *T. and A. were seised of an estate tail, executed sub modo, viz. until the birth of issue male; and then by operation of law, the estates are divided; viz., T. and A. become tenants for their lives, the remainder to the issue male in tail, the remainder to the heirs male of T. and A.*
2. *Tenant in tail, after possibility of issue extinct, shall not be punished for waste; shall not be compelled to attorn; shall not have aid; on alienation no consimili casu lies; after death there can be no intrusion; such tenant may join in the mise on the mere right; shall not name herself nor be named tenant for life; such tenant has but an estate for life, and a feoffment in fee is a forfeiture. An exchange between her and tenant for life is good.*
3. *The estate of tenant in tail after possibility ought to be a remnant and residue of an estate tail, and cannot be by the limitation of the party; a tenancy in tail after possibility will not merge a prior estate for life.*
4. *A., although but tenant for life, shall have the privilege of tenant in tail after possibility, for the inheritance that was once in her.*
5. *If tenant for life or years fells timber, or pulls down the house, the lessor shall have*

(*a*) *Bowles v. Bury*, S. C. 1 Roll. Rep. 177.

the timber. If a house falls down per vim venti, the particular tenants have a special property in the timber to rebuild the house. 6. The pre-eminence and privilege which the law gives to houses. 7. Tenant for life without impeachment of waste has as great power to do waste, and convert it, at his own pleasure, as tenant in tail has. The privilege is annexed to the privity of estate; if one who has a particular estate without impeachment of waste changes his estate, he loses his advantage. 8. When timber trees are severed from the inheritance, either by act of the party or of the law, and become chattels, the whole property of them is in the tenant for life without impeachment of waste.

LEWIS BOWLES, Esq., brought an action upon the case upon trover against Haseldine Bury the younger (which began in the King's Bench, Hil. 10 *Jacobi Regis, Rot.* 1319 (*b*); and declared that he was possessed of thirty cart-loads of timber, and lost them, and that they came into the hands of the defendant, and that he, 20 Feb. anno 9 Jac. Regis, at Norton in the county of Hertford, converted them to his own use; and, upon not guilty pleaded, the jury gave a special verdict to this effect:—Thomas Bowles, Esq., grandfather of the said Lewis, was seised of the manor of Norton Bury in the said county in fee, and 1 Sept. anno 12, by indenture, betwixt him on the one part and William Hide and Leonard Hide of the other part, in consideration of a marriage to be had betwixt the said Thomas Bowles and Anne, daughter of the said William Hide, &c., covenanted, that after the said marriage had and solemnized, the said Thomas, his heirs and assigns, would stand seised of the said manor of Norton Bury, to the use of the said Thomas and Anne *for the term of their lives without impeachment of waste*; and after their deceases to the use of their first issue male, and to the heirs male of such issue lawfully begotten, and so over to the second, third and fourth issue male, &c., and for want of such issue, to the use of the heirs male of the body of the said Thomas and Anne lawfully begotten; and for want of such issue, to the use of Thomas Bowles, son and heir apparent of Thomas Bowles the grandfather, and the heirs male of his body issuing, and for want of such issue, to the use of the heirs of the body of the said Thomas and

(*b*) Raym. 284.

Anne lawfully issuing. Which marriage was solemnized accordingly, and the said Thomas the grandfather, and Anne, had issue John; and afterwards the said Thomas the grandfather died without any issue on the body of Anne, but the said John; after whose death the said Anne entered into the said manor, and was thereof seised, with the said remainder over as aforesaid, and afterwards the said John Bowles died, and afterwards Thomas the son conveyed by fine his remainder to the use of Lewis Bowles the plaintiff, and Diaua, his wife, and the heirs male of his body; and the said Anne being so seised of the said manor, with the remainder over as aforesaid, viz. 20 Feb. ann. Reg. Jac. reg. 9, a barn, parcel of the said manor, *per vim ventorum et tempestat' pœnitus subuers. et ad terram deject' fuit*, and that the said thirty cart loads of timber, in the declaration mentioned, were parcel of the said barn, and that the said timber was sound and fit for building, whereof the defendant as servant of the said Anne, and by her command, took the said timber and carried it out of the limits of the said manor to Radial, in the same county; and afterwards the said Anne, 24 Feb. anno 9 Jac. Reg., made her last will, and thereof made Robert Osborne and Leon. Hide, Knts., her executors, and died; after whose death the plaintiff seized the said timber, and afterwards the defendant, by the command of the said executors, converted it to his use, and if upon the whole matter the defendant was guilty or not, the jury prayed the opinion of the Court.

And in this case two questions were moved:—1. If upon the whole matter the wife should be tenant in tail after possibility, or that she should have the privilege of a tenant in tail after possibility, *sc.* to do waste, &c. 2. Admitting that she should not have the privilege, &c., if the clause of “without impeachment of waste” shall give her property in the timber so blown down by the wind.

And in this case eight points were resolved by the whole Court:—

1. That, till issue, Thomas the grandfather and Anne were seised of an estate tail executed *sub modo*, *sc.* until the birth of the issue male, and then by the operation of law the estates are divided, *sc.* Thomas and Anne become tenants for their lives, the remainder to the issue male in tail, the reversion to the heirs male of Thomas and Anne, the remainder over as aforesaid; for the estate for their lives is not absolutely merged, but (exists) with this implied limitation, until

they have issue male. Vide *Chudleigh's Case*, in the First Part of my Reports, fol. 120; and *Archer's Case*, fol. 66 b (c). 2. That tenant in tail, after possibility, has a greater pre-eminence and privilege in respect of the quality of his estate than tenant for life, but he has not a greater quantity of estate than tenant for life; in respect of the quality of his estate, it tastes much of the quality of an estate in tail out of which it is derived; and therefore, 1. (d) She shall not be (e) punished for waste. 2. She (f) shall not be compelled to attorn. 3. She (g) shall not have aid. 4. On (h) her alienation no *consimili casu* lies. 5. After (i) her death no writ of intrusion lies. 6. She (k) may join the mise in a writ of right in a special manner (Temp. E. 1, "Waste," 125; 39 E. 3, 16 a, b; 31 E. 3, "Aid," 35; 43 E. 3, 1 a; 45 E. 3, 22; 46 E. 3, 13 a, 27; 11 H. 4, 15 a; 7 H. 4, 10 b; 2 H. 4, 17 b; 42 E. 3, 22; 3 E. 4, 11 a; 21 H. 6, 56; 10 H. 6, 1 b; 13 E. 2, *Entre Congeable*, 56; 28 E. 3, 96 b; 26 H. 6, "Aid," 77; F. N. B. 203). 7. In (l) an action brought by her she shall not name herself tenant for life. 18 E. 3, 27 a. A woman brought a *cui in vitâ quod clamat tenere ad vitam*, and maintained it in her count by a gift in special tail to her and her husband, and that her husband was dead without issue, and the writ for variance of the title abated. 8. In an action brought against her, she shall not be named tenant for life, *se. quod tenet ad terminum vite*, Mich. 39 & 40 Eliz. Rot. 3316, in *Communi Banco* (m), *inter Veal et alios quer' et Read def'* in *quid juris clamat*, and the note of the fine supposed that the defendant *tenet ad terminum vite*, the defendant demandedoyer of the writ and of the note of the fine, and had it, and pleaded that he was seised in fee *absque hoc quod*, the day of the note levied *tenuit*

(c) 1 Ves. 177, 526; 2 Vern. 545; 1 Vent. 306, 307, 345; 2 Jones, 2, 77; 3 Keb. 177, 178, 244, 501; Raym. 38, 249.

(d) Doct. and Stud. lib. 2, c. 1; Litt. s. 34; 12 H. 4, 3 b, 4 a; 10 H. 6, 1 b; 45 E. 3, 25 a; 11 H. 4, 14 b, 15 a; 11 H. 6, 1 b; 2 Roll. 826, 828; 1 Roll. Rep. 100, 179, 184; West's Symb. 180 b; 9 Co. 139 a; 6 Co. 41 a; 2 Inst. 306, 302.

(e) 4 Co. 63 a; Co. Litt. 27 b; 1 Roll. Rep. 179; F. N. B. 59 b; 39 E. 3, 16 a, b.

(f) Co. Litt. 27 b; 1 Roll. Rep. 179; 1 Roll. 296; 39 E. 3, 16 a, b; 11 H. 6, 1 b; 43 E. 3, 1 a; Br. "Attorn," 10; Br. "Quid Juris clamat," 1, 6; 46 E. 3, 13 a; Fitz. "Quid Juris clamat," 14, 19; 38 E. 3, 20 a, b; 3 E. 4, 11 a; 12 E. 4, 3 a;

2 H. 5, 1 b; 29 E. 3, 1 b. Attornment was rendered unnecessary by 4 & 5 Anne, c. 16; and see 11 Geo. 2, c. 19.

(g) 31 E. 3, "Aid," 35; 8 H. 6, 25 a; 10 H. 6, 1 b; Fitz. "Aid," 67; 7 E. 3, 7 a, b; Fitz. "Monst. de Faits," 9; 26 H. 6, "Aid," 77; Co. Litt. 27 b; 1 Roll. 167; 39 E. 3, 16 a, b; 2 H. 4, 17 b; Br. "Aid," 37; 11 H. 4, 15 a; 1 Roll. Rep. 184.

(h) 1 Roll. Rep. 179; Co. Litt. 27 b.

(i) Ib.

(k) Ib. 39 E. 3, 16 b.

(l) 1 Roll. Rep. 179; Co. Litt. 27 b; Doct. pl. 241.

(m) 2 Roll. Rep. 179; 46 E. 3, 27 a, b; Cro. El. 671; Noy, 74.

pro termino vite, and the jury found that he held as tenant in tail after possibility of issue extinct; and it was adjudged *pro defendente*, for tenant in tail, after possibility, shall not be, in judgment of law, included in a writ or fine, &c., within the general allegation of a tenant for life. Vide 19 E. 3, 1 b.

But as to the quantity, he has but an estate for life, and therefore, if he makes a feoffment in fee (*n*), it is a forfeiture of his estate (13 E. 2, *Entre Cong.* 56; 45 E. 3, 22; 21 E. 3, 96 b; 27 Ass. 60; F. N. B. 159). So if fee or tail general descends or remains to tenant in tail, after possibility, &c., the fee or estate tail is executed (32 E. 3, "Age," 55; 50 E. 3, 4; 9 E. 4, 17 b). And by the stat. of W. 2 (*o*), he in reversion should be received upon his default (2 E. 2; "Resceit," 147; 41 E. 3, 12; 20 E. 3, "Resceit"; 38 E. 3, 33 (*p*); vide 28 E. 3, 96 b; 39 E. 3, 16 a, b). And an exchange (*q*) betwixt tenant for life and tenant in tail, after possibility, is good, for their estates are equal (*r*).

3. It was resolved, that the estate of a tenant in tail, after possibility, ought to be a remnant and residue of an estate tail, and that by the act of God, and not by the limitation of the party (*s*), *dispositione legis*, and not *ex provisione hominis*; and therefore, if a man makes a gift in tail upon condition, that if he does such an act, that he shall have but for life, he is not tenant in tail after possibility of issue extinct, for that is *ex provisione hominis* and not *ex dispositione legis*; but it ought to be the remnant and residue of an estate tail, and that by the act of God and the law, sc. by the death of one donee without issue, Litt. 6, b; Doct. and Stud. lib. 2, cap. 1, fol. 61; 2 H. 4, 17 b; 26 H. 6, "Aid," 77.

If tenants in special tail recover in assise, and afterwards one dies without issue, and afterwards he who survives (who is tenant in tail after possibility) is re-disseised, he shall have a re-disseisin, for it is the same freehold he had before, for it is parcel of the estate tail; and because the wife in the case at bar had the estate for life by limitation of the party, and the estate which she had in the remainder (*t*), of the

(*n*) 10 H. 6, 2 b; 11 H. 4, 15 a; 43 Ass. 24; Br. "Forfeiture," 88; Br. "Aid," 37; 1 Roll. Rep. 179; 1 Roll. 851; 45 E. 3, 25 a; Co. Litt. 28 a; Br. "Waste," 43; Br. "Entre Congeable," 12; Litt. s. 34; 39 E. 3, 16 a; 3 H. 6, 52 a; but see now 7 & 8 Vict. c. 76, s. 7, and 8 & 9 Vict. c. 106, s. 4.
(*o*) Co. Litt. 28 a; 1 Roll. Rep. 179; 9

E. 4, 18 a; Br. "Estate," 25; Br. "Tenant per Curtesy," 4.

(*p*) 1 Roll. Rep. 179; Co. Litt. 28 a.

(*q*) See 3 Salk. 158.

(*r*) Co. Litt. 28 a; 1 Roll. Rep. 179.

(*s*) 1 Roll. Rep. 183; Co. Litt. 28 a.

(*t*) Co. Litt. 154 b.

tenancy in tail after possibility, was not a larger estate in quantity, and, therefore, could not merge the estate for life, as has been said before, for this cause the wife was not tenant in tail after possibility (*u*).

4. It was resolved, that in this case the wife should have the (*x*) privilege of a tenant in tail after possibility for the inheritance which was once in her; for now, when John, the issue male, is dead, the privilege which she had in respect of the inheritance which was in her in remainder shall not be lost. And there is no question but a woman may be tenant in tail after possibility of a remainder, as well as of a possession; and therefore, if a lease for life is made, the remainder to husband and wife in special tail, and the husband dies without issue, now is the wife tenant in tail after possibility of this remainder; and if the tenant for life surrenders to her, as he may (for the life of him in the remainder is higher than the other life), now is she tenant in tail after possibility of possession: and like this case, if the father is enfeoffed to him and his heirs with warranty, and the father enfeoffs the son, &c., and dies, in this case the son, although he has the land by purchase, yet he shall take the benefit of the warranty as heir, for he cannot vouch as assignee, and the warranty betwixt the father and him is lost, as it is adjudged in 43 E. 3, 23 b (*y*). So here, although the wife cannot claim the estate of tenant in tail after possibility, yet she may claim the privilege and benefit of it. And it was observed, that tenants in special tail at the common law had a limited fee simple, and when their estate was changed by the statute *De donis conditional*, yet there was not any change of their interest in doing of waste: so when by the death of one donee without issue the estate is changed, yet the power to commit waste, and to convert it to his own use, is not altered nor changed for the inheritance which was once in him, *vide Hil. 2 Jac. Rot. 229 inter (z) Brooke and Rogers, in Communi Banco*, if a timber tree becomes *arida, sicca, non portans fructus, nec folia in aestate, nec existens mæremium*, yet because it was once an inheritance, &c., no tithes shall be paid for it, for that the quality remains, although the state of the tree is altered.

5. That if (*a*) tenant for life, or for years, fells timber, or pulls down

(*u*) See *Cragh v. Blood*, 3 J. & L. 133. (*z*) Moor, 908; 2 Inst. 643; 1 Roll. Rep. 100; 1 Roll. 640; Cro. Jac. 100; 11 Co. Prest. Conv. 234. Rep. 48 b, 49 a; Doct. and Stud. 175 b.
 (*y*) 2 Roll. 742; 1 Co. 98; 1 Roll. Rep. 180; Co. Litt. 384 b. (*a*) Cro. Car. 242, 274; 2 Roll. 119.

the houses, the lessor shall have the timber; and because this point was resolved in this Court upon a solemn argument in *(b) Liford's Case*, at Michaelmas Term, which *vide* before in this book, I will make the shorter report. 1. It is apparent in reason, that the lessee had them but as things annexed to the soil, and therefore it would be absurd in reason, that when by his act and wrong he severs them from the land, that he should gain a greater property in them than he had by the demise. 2. It *(c)* is without question (as it is resolved in the said case), that the lessor has the general ownership and right of inheritance in the houses and timber trees, and the lessee has but a particular interest, and, therefore, be they pulled down or felled by the lessee or any other, or by wind or tempest blown down, or by any other means disjoined from the inheritance, the lessor shall have them in respect of his general ownership, and because they were his inheritance; and as to *that*, the resolutions in *Herlakenden's Case*, in the Fourth Part of my Reports, folio 63 a, were affirmed for good law *(d)*, and *Page's Case*, in the Fifth Part of my Reports, folio 76 b, for although he cannot punish them in an action of waste at the common law, because it was his own act, and in his lease he has not made provision by covenant or condition; yet the inheritance and general ownership remains in the lessor, and the lessee (as hath been said) has but a special interest in the houses and timber trees, so long as they are annexed to the land, and this appears by the statute of *(e)* Marlebridge, c. 23. *Item firmarii vastum, &c., non facient, nisi specialem inde habuerint concessionem per scriptum conventionis, mentionem faciens quod hoc facere possunt*, whereby it appears, that the lessees for life or years which then were, could not rightfully fell the trees or pull down the houses, unless the lessor had granted by deed to do it. In which it was also observed, that, at the time of the making of the same act, the said clause of "without impeachment of waste" was in use, which proves that it was to such purpose that the lessee might commit waste and dispose it to his own use, which he could not do without such clause. 3. Every lessee for life and years ought by the law to do fealty upon his oath, and it would be against his oath to waste the houses and timber trees. And, *nota*, reader, upon this

(b) 11 Co. Rep. 48a.

(c) Cro. Car. 243; 11 Co. Rep. 48b;
Cro. Car. 242; Moor, 19; Palmer, 327; 5
Co. 76b; 4 Co. 62, 63; 1 Roll. Rep. 181.

(d) 4 Co. 62b; Doct. and Stud. lib. 2,

c. 1.

(e) 1 Roll. Rep. 182; 2 Inst. 144, 145,
302.

statute of Marlebridge lies a prohibition of waste against the lessee for life, and lessee for years, to prohibit them, that they shall not do waste before any waste was done, as it was (*f*) against tenant in dower, and tenant by the courtesy at the common law. *Vide* Bract. 316, the judgment in waste at the common law. Tenant in dower or by the courtesy have as high an estate as lessee for life, and it appears that it was not lawful for tenant by the courtesy or in dower to do waste, *ergo* no more for tenant for life: the only difference was, that a prohibition of waste laying against tenant in dower, and by the courtesy, at the common law, and not against the lessees till the said statute of Marlebridge. And to prove what interest the lessee for life has in the trees at the common law, it appears by Bracton (who wrote before the statute of Glou'), lib. 4, Tract' de Assisâ Novæ Dis. c. 4, f. 217. *Si quis vastum fecerit, vel destructionem in tenemento quod tenet ad vitam suam in eo quod modum excedit, et rationem, cum tantum concedatur ei rationabile estoverium, et non vastum, facit transgressionem, et si talis impediatur, ille tenens assisam non habebit. Intentio enim talis liberabit a disseisina, quia in eo quod tenens abutitur male utendo, et debitum usum in modum debitum excedendo, non poterit dicere quod disseisitus est, quia tantum rationabilis usus ei conceditur*; which proves directly, that it was a wrong in the lessee for life to do waste or destruction at the common law. And it was resolved, if a house falls down (*g*) *per vim venti* in the time of such lessee for life or for years, or in the time of the tenant in dower, or tenant by the courtesy, &c., that such particular tenants have a special property in the timber to rebuild the like house as the other was for his habitation: as if they fell a tree for reparation, they have a special property to that purpose in it, and therewith agree (*h*) (44 E. 3, 5 b; 44 E. 3, 44 b; 29 E. 3, 3, and 10 E. 4, 3 a). But the said particular tenants cannot give or sell the tree so felled, for the general property is in the lessor; and therefore, Litt., f. 15, holds, that if I bail goods [cattle] to another to manure his land, now he has a special property in them to that purpose; and in that case, if he kills them, a general action of trespass lies against him. See 11 H. 4, 17 a, and 23 b.

6. The pre-eminence and privilege (*i*) which the law gives to houses

(*f*) 2 Roll. 813; Co. Litt. 53b; 2 Inst. 145; 4 Co. 62b; 14 H. 8, 6a; 13 H. 7, 20b.

(*g*) 1 Co. 63a; Co. Litt. 53a.

(*h*) Cro. Eliz. 784; 11 Co. 47a; 1 Roll.

Rep. 181; 2 Roll. 556; 5 Co. 13 b; Cro. Car. 274.

(*i*) See 6 Mod. 105, &c., Ibid.

which are for men's habitation was observed. First, a house ought to have the priority and precedency in a *præcipe quod reddat* before land, meadow, pasture, wood, &c., F. N. B. 2, &c., for his house is his castle, *et (k) domus sua est unicuique tutissimum refugium*. 2 (*l*). The house of a man has privilege to protect him against arrest, by virtue of process of law, at the suit of a subject; *vide Semayne's Case*, in the Fifth Part of my Reports, fo. 91 b. 3. It has privilege against the king's prerogative, for it was resolved by all the judges, Mich. (*m*) 4 Jac., that those who dig for salt-petre shall not dig in the mansion-house of any subject without his assent, for then he, or his wife or children cannot be in safety in the night, nor his goods in his house preserved from thieves and other misdoers. 4. He who kills a man *se defendendo*, or a thief who would rob him in the highway, by the common law shall forfeit his goods, but he who kills one that would rob and spoil him in his house shall forfeit nothing (3 E. 3, "Corone," 330; and 26 Ass. 23, &c.). 5. If there be two joint-tenants of a wood, or arable land, the one has no remedy against the other to make inclosure or reparations for safeguard of the wood or corn; but if there be two joint-tenants of a house, the one shall have a writ *De reparatione faciendâ* against the other, and the words of the writ are *ad reparationem et sustentationem ejusdem domus tenetur (n)* (F. N. B. 127 a, b). If a man is in his house, and hears that others will come to his house to beat him, he may call together his friends, &c. into his house to aid him in safety of his person (*o*); for, as it has been said, a man's house is his castle and his defence, and where he properly ought to remain: but if a man be threatened if he comes to such a fair or market that he shall be beaten, in that case he cannot make such assembly, but he ought to have remedy by surety of the peace. 21 H. 7, 39 a (*p*).

7. The clause of "without impeachment of waste" gives a power to the lessee, which will produce an interest in him if he executes his power during the privity of his estate, and therefore to examine it in

(*k*) 5 Co. 31b; Co. Litt. 4a; 1 Roll. Rep. 182; 3 Inst. 162.

(*l*) 4 Inst. 177; Hob. 62, 263, 264; Cro. Jac. 486, 556; 1 Jones, 429; Cro. Car. 437, 438; March, 3; 1 Brownl. 50; Yelv. 28, 29; Cro. Eliz. 908; Moor, 668; 18 E. 2, "Execution," 252, contra; 4 Leon. 41; 13 E. 4, 9a; 18 E. 4, 4a; Br. "Execution," 100; Br. "Trespas," 390; 1 Bulstr. 146;

Ben. 121.

(*m*) 1 Roll. Rep. 182; 12 Co. 13.

(*n*) Co. Litt. 54b; 1 Roll. Rep. 182; 5 Co. 91b.

(*o*) 21 H. 7, 39a; Br. "Riots," &c.; 1 Fitz. "Trespas," 246; 6 Mod. 210.

(*p*) 1 Roll. Rep. 182; Moor, 18, 327; 2 Inst. 146; Hob. 132, lib. 4, f. 63a; Poph. 193, 194, 195.

reason. 1. These (*q*) words, *absque impetitione vasti*, are as much as to say, without any demand for waste, for *impetitio* is derived from *in* and *peto*, and *petere* is to demand, and *petitio* is a demand, and *sine impetitione* is without any manner of demand or impeachment: then this word demand is of a large extent (*r*), for if a man disseises me of my land or takes my goods, if I release to him all actions, yet I may enter into the land or take my goods, as Litt. holds, f. 115, and therewith agree 19 Ass. 3; 19 H. 6, 4 b; 21 H. 7, 23 b; 30 E. 3, 19, for by the release of the action the right or interest is not released; but if in such case I release (*s*) all demands, that will bar me, not only of my action but also of my entry and seizure, and of the right of my land, and of the property of my goods: as it was resolved in *Chauncy's Case*, 34 H. 8; Br. "Release," 90 (*t*); 2 H. 7, 6 b; the king made one sheriff *sine computo*, thereby he shall have the revenues which belong to his office to collect to his own use. But if the words had been (*u*) *absque impetit' vasti per aliquod breve de vasto*, then the action only would be discharged, and not the property in the trees, but that the lessor after the fall of them might seize them: and this difference appears in 3 E. 3, 44 a, b, in *Walter Idle's Case* (*x*), where a lease was made "without being impeached or impleaded for waste," upon which it was collected that these words "without being impleaded," without these words "without (*y*) being impeached for waste," were not sufficient to bar the lessor of his property; and that if the lessor had granted that the lessee might do waste, he thereby had power not only to do waste, but also to convert it to his own use; and that the words of the said act of Marlebridge, and the statute *De* (*z*) *prærogativâ Regis*, c. 16, do prove, where it is said, that the king shall have *annum, diem, et vastum*, *sc.*, which is as much as to say, that he shall have the trees, &c. at his own disposition. 2. It was said, that the continual and constant opinion of all ages was, that those words gave (*a*) power to the lessee to do waste to his own house, and it would be dangerous

(*q*) Latch. 269, 270; Bridg. 102; Dy. 47, pl. 11 b; 2 Co. 23a, 72a, pl. 135 b; Cro. Jac. 216; 2 Roll. 835; 2 Inst. 146; 9 Co. 9a; 2 Roll. Rep. 325; Hetl. 77; Moor, 317.

(*r*) Litt. f. 116, ss. 496, 497; Co. Litt. 386a, b; 4 Co. 63a; 1 Roll. Rep. 184.

(*s*) 1 Roll. Rep. 184; 8 Co. 154a.

(*t*) 1 Roll. Rep. 183; Br. "Patent," 45,

109.

(*u*) Co. Litt. 220a; 2 Inst. 146; 1 Roll. Rep. 184; Cro. Car. 274.

(*x*) 8 Co. 75 b; Poph. 194.

(*y*) 1 Roll. Rep. 184; Hob. 132.

(*z*) 1 Roll. Rep. 182.

(*a*) Dyer, 184, pl. 63; 1 Roll. Rep. 183; Co. Litt. 220a; Hob. 132.

now to recede from it; and as it is said in 38 E. 3, 1 a, by the judges (so we say in this case), we will not change the law which has been always used; and it is well said in 2 H. 4, 18 b, it is better that there should be a defect than that the law should be changed (*b*); and the opinion of Wray, Chief Justice, and Manwood, cited in *Herlakenden's Case*, was not judicial but *prima facie* upon an arbitrament without any argument, and perhaps upon the sight of (*c*) 27 H. 6, "Waste," 8; and therefore, although the chief justice argued in this case against their opinions, yet it was with great reverence to them, saying with Aristotle in the like case, *amicus Plato, amicus Socrates, sed magis amica veritas*; and *qui non liberè veritatem pronunciat, proditor veritatis est*. And the truth of this case appears by Littleton in his chapter on Conditions, fol. 82 (*d*), where he puts this case, if a feoffment be made upon such condition that the feoffee shall give the land to the feoffor, and to the wife of the feoffor, to have and to hold to them and to the heirs of their two bodies begotten, the remainder to the right heirs of the feoffor; in that case if the husband dies, living the wife, before any estate in tail made to them, then ought the feoffees by the law to make an estate to the wife as near the condition and as near the intent of the condition as he can make it, *sc.* to lease the land to the wife for term of her life without impeachment of waste, the remainder to the heirs of the body of her husband on her begotten, the remainder to the right heirs of the husband: and the reason why the lease shall be made in this case to the wife without impeachment of waste is, that the estate shall be to the husband and his wife in tail; and if such estate had been made in the life of the husband, then after the death of the husband she had had an estate in tail, which estate is without impeachment of waste; and so it is reasonable that a man should make an estate as near the intent of the condition as he can; which case directly proves that tenant for life without impeachment of waste has as great power to do waste and to convert it at his own pleasure as tenant in tail had. That these words "without impeachment of waste," are sufficient words to give tenant for life such power, *vide* (*e*) 2 H. 4, 5 b, and the *Lord Cromwell's Case*, in the Second Part of

(*b*) 1 Roll. Rep. 183; 4 Co. 63a; Dyer, 1 Roll. Rep. 183; Vin. Abr. "Waste," 9a; 148, pl. 63. 2 R. a.

(*c*) Poph. 194.

(*d*) Sect. 352; Co. Litt. 218b, 219a;

(*e*) Fitz. "Condition," 5; Br. "Condition," 33.

my Reports, f. 81 a, b, 82 a; and for this clause of "without impeachment (*f*) of waste," 3 E. 3, 44; 8 E. 3, 4 a, b, 35 a; 24 E. 3, 32; 43 E. 3, 5 a; 5 H. 5, 8; 27 H. 6, "Waste," 8; 4 E. 4, 36 a; 20 H. 7, 10; 28 H. 8; Dyer, 10; and so the *quare* in the said book of 27 H. 6 well resolved. And see the opinion of Statham in abridging the said book against it (*g*). But the said privilege of "without impeachment of waste" is annexed to the privity of estate, 3 E. 3, 44, by *Shard* and *Stone*:—If one who has a particular estate without impeachment of waste changes his estate, he loses his advantage, 5 H. 5, 9 a. If a man makes a lease for years, without impeachment of waste, and afterwards he confirms the land to him for his life, now he shall be charged for waste, 28 H. 8; Dyer, 10 b (*h*). If a lease is made to one for the term of another's life, without impeachment of waste, the remainder to him for his own life, now he is punishable for waste, for the first estate is gone and drowned; so of a confirmation. It was adjudged in *Ewen's* (*i*) *Case*, Mich. 28 & 29 Eliz., that where tenant in tail, after possibility of issue extinct, granted over his estate, that the grantee was compelled in a *quid juris clamat* to attorn, for by the assignment such privilege is lost; and that judgment was affirmed in the King's Bench in a writ of error, and therewith agrees (*k*) 27 H. 6, "Aid," in Statham; *vide* 29 E. 3, 1 b. The heir at common law should have a prohibition of waste against tenant in dower, but if the heir granted over his reversion, his grantee should not have a prohibition of waste; for it appears in the Register, 72, that such assignee in an action of waste against tenant in dower shall recite the Statute of Gloucester, *ergo* he shall not have a prohibition of waste at common law, for then he should not recite the statute, *vide* F. N. B. 55 c; 14 H. 4, 3; 5 H. 5 (7), 17 b.

Lastly, it was resolved, that the said woman, by force of the said clause of "without impeachment of waste," had such power and privilege; that though in the case at bar no waste be done, because the

(*f*) 1 H. 7, 15 a; Plowd. 141 a; 21 H. 6, 47 a; 28 H. 8; Dyer, 10, pl. 37; 20 H. 7, 4 a; 21 H. 7, 24 a; Perk. s. 721; 21 H. 7, 31 a; 2 Co. 23 c; 9 Co. 9 a; Co. Litt. 220 a; 3 Bulst. 136; 9 H. 6, 35 a; Fitz. "Waste," 39; Plowd. 135 b; 19 H. 6, 63 b; 10 H. 7, 3 a; 21 H. 7, 24 a; 16 H. 7, 4 b; 2 Roll. Rep. 325; Poph. 193, 194, 195.
(*g*) 1 Roll. Rep. 183; Co. Inst. 28 a; Moor, 327; 8 Co. 76 b; Br. "Waste," 71;

Latch. 269.

(*h*) Dyer, 10, pl. 37; 5 Co. 13 a; 1 Bulst. 136; 8 Co. 76 b; 19 H. 6, 23 a; Poph. 194; Latch. 269.

(*i*) 1 Roll. Rep. 179; Co. Litt. 316 a; 28 a; 2 Inst. 302.

(*k*) Co. Litt. 28 a; Dyer, 184, pl. 63; Moor, 321; Poph. 194; Latch. 262; 1 Roll. Rep. 183.

house was blown down *per vim venti* without her fault, yet she should have the timber which was parcel of the house, and also the timber trees which are blown down with the wind; and when they are severed from the inheritance, either by the act of the party or of the law, and become chattels, the whole property of them is in the tenant for life, by force of the said clause of "without impeachment of waste." And for this cause judgment was given *per omnes Justiciarios una voce, quod querens nihil caperet per billam.*

Lewis Bowles's Case is usually cited as a Leading Authority whenever questions arise relative to the estates of persons having freeholds not of inheritance, and in determining what is their power over or their interest in them. See Poph. 193; Co. Litt. 28 a; 15 Ves. 423.

Estates of freehold not of inheritance, are, *first*, conventional, that is to say, created by some legal instrument, as a deed or will; and *secondly*, such as arise by mere operation of law.

Of the first class are tenancies for a man's own life, and *pour autre vie*, or for another's life. Of the second class—The estate of tenant in tail after possibility of issue extinct; the estate of tenant by the Curtesy; and Dower.

I. Estate for Life.

An estate for a person's own life may be either *absolute*, as upon a conveyance or devise to A. for life; or its duration may be limited to some *uncertain* period included in such life; as, for instance, if an estate be conveyed to a woman as long as she remain single or during widowhood, or to a man and woman

during coverture, or so long as a person dwell in a particular house, or so long as he pay a certain sum, or until he be promoted to a benefice, or for any like uncertain time; in all these cases an estate for life is conferred, determinable upon the happening of a particular contingency. Co. Litt. 42 a.

Upon the same principle, if a conveyance be made of a manor to a man until 100*l.* be paid out of the annual profits, inasmuch as such profits are *uncertain*, he will have an estate for life determinable upon the levying of 100*l.* On the other hand, if a man grant a rent of 20*l.* per annum until 100*l.* be paid thereout, the grantee will only have an estate for the term of five years, for there the time which it will take to pay the 100*l.* is *certain*, and depends upon no uncertainty. Co. Litt. 42 a.

There are, however, some uncertain interests of an exceptional character, which are held to be chattels. Thus where lands are devised to executors for payment of debts, until the testator's debts be paid, although it is uncertain when that will take place, the executors

have only a chattel interest, the reason being that if it were held that the executors should have it for their lives, then by their deaths their estate would cease; but by holding it to be a chattel, it will go to the executors of the executors for payment of the debts. Co. Litt. 42 a.

Moreover, although tenants by statute merchant, by statute staple, and by elegit, whose estates are created by divers acts of parliament, have uncertain interests in lands or tenements, they have but chattel, and not freehold, interests. Co. Litt. 42 a.

Where there is no express limitation of any estate, either under a conveyance at common law or under the Statute of Uses, the person to whom the conveyance is made, will take an estate for his own life. Co. Litt. 42 a.

So where by will a testator gave land to a person without words of limitation, or without words denoting an intention of passing the fee, he would take only a life interest. (See note to *Edward Seymour's Case*, post.) This being found to defeat the intention of persons making wills, it has been enacted by the Wills Act (1 Vict. c. 26, s. 28) that a devise to a person without any words of limitation will pass the fee simple or other the whole estate of the testator, unless a contrary intention appear by the will.

If a tenant in fee simple, however, make a lease to B., To have and to hold to B. for term of life, without mentioning for whose life, it will be deemed for the term of the life of B., upon the ground that

the deed ought to be taken most strongly against the lessor, and an estate for a man's own life is higher than that for the life of another (Co. Litt. 42 a). But if a tenant in tail make such lease without expressing for whose life, it will be taken to be for the life of the lessor, for the law will not adopt a construction which would work a wrong, where it can adopt another which is consistent with the legal rights of the lessor. Co. Litt. 42 a.

II. *Estate pour autre Vie.*

An estate *pour autre vie* is the lowest estate of freehold, being not so great as an estate for one's own life. This estate arises, not only where it is originally limited, as, for instance, in a conveyance to A. for the life of B., but also where a tenant for his own life, whether by convention or by operation of law, as tenant by the curtesy or tenant in dower, grants over his or her estate. Co. Litt. 41 b.

There may also be an estate for a man's own life, together with an estate *pour autre vie*, if, for instance, a lease be made to A. to have to him for the term of his own life and the lives of B. and C. (Co. Litt. 41 b; *Uttly Dale's Case*, Cro. Eliz. 182). So a devise of a rentcharge, "to be continued and equally divided during their lives and the life of the longest liver, to A., B. and C.," has been held to give to each of them an estate for life and *pour autre vie*. See *Chatfield v. Berchtoldt*, 7 L. R., Ch. App. 192, reversing *S. C.*, reported 12 L. R., Eq. 464.

And an estate limited to trustees

and their heirs to preserve contingent remainders, has been construed as an estate pour autre vie to give effect to the general intention of the deed. *Beaumont v. The Marquis of Salisbury*, 19 Beav. 198.

General Occupancy.

According to the common law, where an estate was held pour autre vie, as, for instance, by A. for the life of B. (who is termed the cestui que vie), and the tenant pour autre vie died in the life of the cestui que vie, inasmuch as the heir could not take the estate without words of inheritance, and the personal representatives could not take it because it was a freehold, the first person who entered might hold as tenant pour autre vie, and he was termed a *general occupant* (Co. Litt. 41 b). The same result followed where the grantee of the tenant pour autre vie died (Ib. 41 b); and any person in possession as a lessee (3 Bac. Ab. 188), or a mere tenant at will in preference to a lessee not in possession (*Anon.*, 1 Vern. 233, cited), would consequently have been general occupant.

Against the king there could be no occupant, and therefore no man could gain the king's land by priority of entry. Co. Litt. 41 b.

Special Occupancy.

Where, however, an estate pour autre vie was limited to a man and his heirs, his heir took as *special* occupant and not by descent, and not being liable to his ancestor's debts, he could plead *riens per descent*. *Atkinson v. Baker*, 4 T. R. 229; *Doe v. Lurton*, 6 T. R. 292.

If the limitation were to a man, his executors and administrators, notwithstanding the doubts which formerly existed upon the subject, they would take as *special* occupants. *Duke of Marlborough v. Godolphin*, 2 Ves. 61; *Ripley v. Waterworth*, 7 Ves. 425; and see 18 Ves. 273; *Northern v. Carnegie*, 4 Drew. 587—591.

And where an estate pour autre vie is limited, either in a deed or a will, to a man, his heirs, executors, and administrators, the heir will take as *special* occupant. *Atkinson v. Baker*, 4 T. R. 229. See also *Carpenter v. Dunsmure*, 3 Ell. & Bl. 918.

With regard to incorporeal hereditaments, as rents, of which a man was tenant pour autre vie, although upon his death there could not be a *general occupancy*, because there could be no entry thereon, there might be *special* occupancy (Co. Litt. 41). Thus where a rent-charge was limited to a man and his heir pour autre vie, upon his death his heir would take as quasi special occupant (*Hassell v. Gouthwaite*, Willes, 505; *Kendall v. Micfeild*, 15 Vin. Abr. "Mortgage," 457; *Barnard. C. C.* 46); but it seems formerly to have been considered that his executors or administrators would not take as special occupants, though named (*Crawley's Case*, Cro. Eliz. 721; *Salter v. Butler*, Ib. 901; *Moore*, 664; *Vaugh.* 200; *Vin. Abr.* "Occupant" (C); 3 Bac. Ab. B. "Estate for Life and Occupancy"). But in *Northern v. Carnegie*, 4 Drew. 587, Sir R. T. Kindersley, V.-C., observed, that as an executor may be special occupant of a "*corporeal* hereditament, he should have no

difficulty in coming to the conclusion that he may also be special occupant of an incorporeal hereditament."

Great inconvenience being occasioned by the scramble for estates which occurred, where *no special occupant* was named, and it being manifestly unjust that an estate pour autre vie should not be assets for payment of debts, the Statute of Frauds (29 Car. 2, c. 3) enabled the tenant pour autre vie to devise it, and enacted, that if no devise were made, it should be chargeable in the hands of the heir, if it came to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple; and in case there should be no special occupant, it should go to the executors or administrators, and be assets in their hands.

As doubts arose to whom the *surplus* of such estates (when they were not devised) should go, after paying the intestate's debts, it being held, however, that the next of kin were not entitled (*Oldham v. Pickering*, 2 Salk. 464; *Carthew*, 376), the 14 Geo. 2, c. 20, s. 9, enacted that such estates pour autre vie, in case there were no special occupant thereof, of which no devise had been made by virtue of the 29 Car. 2, c. 3, should be distributed as the personal estate of the testator or intestate.

General occupancy, it will be observed, was abolished by 29 Car. 2, c. 3; hence, on the death of a person having an estate pour autre vie, without any words of limitation, the estate would go to his devisee, or, if he died intestate as to it, to his

executors or administrators, and be assets in their hands for payment of his debts; and by 14 Geo. 2, c. 20, the surplus would be distributable amongst his next of kin as personalty. In the case of *Doe d. Lewis v. Lewis*, 9 Mees. & W. 662, a person possessed of a lease granted to him, his heirs and assigns, for the lives of three persons, devised the premises to his son (who died intestate) and his assigns for the residue of the term; it was held, by the Court of Exchequer, that the premises went to the administratrix of the son, under the 12th section of the Statute of Frauds, and not to his heir. "Here," said Parke, B., in his judgment, "there is no special occupant, the title of the first lessee having been put an end to by the will; the land has been held under a tenancy pour autre vie to the son and his assigns, and as he died without creating any assigns, the property goes to his personal representative." Sed vide *Doe d. Jeff v. Robinson*, 8 B. & C. 296; 2 Man. & Ry. 249.

In *Doe d. Timmis v. Steele*, 4 Q. B. 663, a tenant in fee conveyed lands "to Hannah Timmis, her *heirs* and assigns, To hold to Hannah Timmis and her assigns during the life of G. T.," who was heir at law of Hannah Timmis. It was held by the Court of Queen's Bench, that after the death of Hannah Timmis G. T. was entitled to hold for his life as special occupant. "Under the words 'to Hannah Timmis and her assigns,' there would be," said Denman, C. J., "no special occupant, but the estate on the death of Hannah Timmis would be personal

assets by virtue of the statutes 29 Car. 2, c. 3, s. 12, and 14 Geo. 2, c. 20, s. 9, whereas under the words 'to Hannah Timmis, her heirs and assigns,' there is a special occupant, namely, her heir. The words of the habendum are, therefore, contradictory and repugnant to the words in the premises, and must, according to the general rule of construction in such cases, be disregarded."

Although we have seen that at common law, if a rent were granted to a man during the life of another, the rent would have determined on the death of the grantee, because there was no one to take under the grant, there being in other words no general occupancy of a rent; nevertheless it has been held, that by the 12th section of 29 Car. 2, c. 3, when the grantee of a rent-charge *pour autre vie* dies during the life of *cestui que vie*, it will go to his executors, although executors are not named in the grant. *Bearpark v. Hutchinson*, 7 Bing. 178; *Chatfield v. Berehtoldt*, 7 L. R., Ch. App. 192, reversing *S. C.*, reported 12 L. R., Eq. 464; see also *Rawlinson v. Duchess of Montague*, 3 P. Wms. 264, n. (D).

Where there is an agreement to let property to a person on a lease for lives, without saying whether the lease is to be executed to such person, "his heirs and assigns," or to him or "his executors, or administrators and assigns," upon the death of such person before the execution of a lease, the court will, it seems, treat the case as if a lease had been executed without any words of limitation, and then the

statute interferes and says the personal representative must take. *M'Dermott v. Balfe*, 2 I. R., Eq. 441.

An estate *pour autre vie* may be limited over by way of remainder (*Wastneys v. Chappell*, 3 Bro. P. C. 50, Toml. Ed.; which though contingent will not, in the case of copyholds and leaseholds, require any prior estate to support it (*Pickersgill v. Grey*, 31 L. J., Ch. 394); and a remainderman (if not barred) will take as special occupant. *Allen v. Allen*, 2 D. & War. 325.

If an estate *pour autre vie* be limited to a man and the *heirs of his body*, or words of similar import, it will go to the person who would take an estate tail in the case of freeholds of inheritance, as quasi tenant in tail *pour autre vie*, and he obtains this estate at once, it not being dependent, as in the case of a fee simple conditional, upon the birth of issue. *Ib.* See also *In re Whitsitt's Estate*, 1 Ir. Com. L. Rep. (N. S.) 633; *In re Mahon's Estate*, *Ib.* 567; *M'Clenahan v. Bankhead*, 8 I. R., C. L. 195.

Where a tenant *pour autre vie* of property limited to him, his heirs and assigns, conveys his whole legal interest to trustees, upon trusts which never arise, the beneficial interest will result to him, or on his death to his heirs as special occupants. *Northen v. Carnegie*, 4 Drew. 587.

It may be here mentioned, as being a recognized rule, that devises of estates *pour autre vie* are, as far as possible, to be construed in the same way as devises of the fee.

M'Clenahan v. Bankhead, 8 I. R., C. L. 215.

Where lands *pur autre vie*, before the Wills Act, 1 Vict. c. 26, came into operation, were devised without words of limitation, a life interest only would pass, in the same manner as if the deviser had been seised in fee. *Hagarty v. Nally*, 13 I. R., C. L. 532.

It seems that words of inheritance are not required to pass the entire interest in an estate for lives, even in a deed, if by other words the intention to pass the whole estate of the grantor be indicated. Thus in *M'Clintock v. Irvine*, 10 Ir. Ch. Rep. 480, where lands for lives renewable for ever were conveyed for all the estate of the tenant to trustees, their heirs and assigns, for the lives in the lease; and the deed contained a declaration that the names of the trustees were made use of as trustees for A. B., and that the grants therein contained were for his sole use and benefit, and for no other use, intent or purpose, it was held by Lord Chancellor Brady, that A. B. took the entire equitable interest in quasi fee. See also and consider *Brenan v. Boyne*, 15 Ir. Ch. Rep. 189; 16 Ir. Ch. Rep. 114; *Betty v. Elliott*, *Ib.* 110, n.

Power of quasi Tenant in Tail pour autre vie over his Estate.

A quasi tenant in tail *pour autre vie in possession* has complete power over the estate to bar the entail and the remainders over, by any act *inter vivos*, dealing with the estate precisely as if there had never been

any settlement (*Ib.* 327); and he can convey his interest by any of the ordinary assurances; and inasmuch as formerly it did not require the solemnity of a fine or recovery (*Blake v. Luxton*, Geo. Cooper, 184, 185; *Low v. Burrow*, 3 P. Wms. 262; *Moriarty v. Grey*, 12 Ir. Com. L. Rep. (N. S.) 129), so now it does not require a disentailing deed under 3 & 4 Will. 4, c. 74.

Moreover, it is not requisite that he should declare his intention of barring the quasi entail, as it is sufficient if he do any act which would vest in him a new or different estate. Thus, it has been held, that a settlement (*Lynch v. Nelson*, 5 Ir. R., Eq. 192), a renewal of a lease for lives by a quasi tenant in tail, gives him a new estate discharged of the former limitations and bars the estate in remainder (*Baker v. Bayley*, 2 Vern. 225; *Grey v. Mannock*, 2 Eden, 339; *In re M'Neale*, 7 Ir. Ch. Rep. 388; *Blanckhall v. Gibson*, 2 L. R., I. 49, where the lease was not only renewed, but converted into a fee farm rent), even although the lease may originally have been vested in trustees who did not join in the surrender of the old lease (*Blake v. Blake*, 1 Cox, 266; 3 P. Wms. 10, n.; and see *Campbell v. Sandys*, 1 S. & L. 295; *Lloyd v. Johns*, 9 Ves. 63; *Doe v. Luxton*, 6 T. R. 289), or prior incumbrances may have been in existence. *Blake v. Luxton*, Geo. Coop. 178; 2 Dru. & War. 327, 330.

And it seems that where a quasi tenant in tail in possession of a renewable freehold takes a fee

farm grant, under the "Renewable Leasehold Conversion Act" (12 & 13 Vict. c. 105), the quasi estate tail and all remainders over will be thereby barred. *Morris v. Morris*, 6 I. C. L. R. 73; 7 I. C. L. R. (Ex. Ch.) 295.

So any act of ownership exercised over the whole estate, as a mortgage, though it be only for a term of years (*Walsh v. Studdert*, 5 I. R., C. L. 478; 7 I. R., C. L. 482), an assignment of a mortgage, if there were an increase of the charge on the lands, or the creation of a new equity of redemption by the quasi tenant in tail, the remainderman will be barred (see *Allen v. Allen*, 2 Dru. & Warr. 331; *Cann v. Cann*, 1 Vern. 480; *Dunn v. Green*, 3 P. Wms. 10; *Challoner v. Murhall*, 2 Ves. jun. 524). *Secus* if the quasi tenant in tail merely concur in a transfer of the mortgage. *Fearne's Executory Devises*, by Powell, vol. 2, p. 322; and see 2 Dru. & Warr. 331.

But, although the assignment of a mortgage by a quasi tenant in tail neither creates a new equity of redemption, nor adds anything to the amount secured by the mortgage, if he confirm the estate already granted in the mortgagee, so that if that had been for any cause defeasible or imperfect his confirmation and grant would necessarily have taken effect out of his estate, and would have been equivalent to a new mortgage by himself, especially if he covenant for a good title, this will be considered as an exercise of his right of ownership sufficient to put an end to the quasi estate tail. *Mac-*

Andrew v. Gallagher, 8 I. R., Eq. 490, 495, 496.

However, a quasi tenant in tail in possession cannot bar the remainders over by a mere will (*Allen v. Allen*, 2 Dru. & Warr. 326); though Lord Kenyon, in *Doe d. Blake v. Luxton*, 6 T. R. 293, thought he might. *Campbell v. Sandys*, 1 S. & L. 294.

The question has been raised whether the renewal of a lease to an infant entitled in quasi tail will bar the entail. In *Betty v. Humphreys*, 9 I. R., Eq. 332, 349, the Master of the Rolls (Ireland) seems to have thought that if a renewal be granted to a tenant in quasi tail while an infant, the entail will not be barred unless the infant comes of age and adopts the renewal. Christian, L. J., however, in a subsequent case (*Batteste v. Maunsell*, 10 I. R., Eq. 341), said that he was not prepared to accede to that; and without giving any positive opinion, said that he was rather disposed to think that as the renewal was *primâ facie* valid, and at the worst only voidable, it merged the old lease and destroyed the limitations, and that nothing less than a disclaimer by the infant after coming of age could have the effect of restoring them.

The renewal of a lease by the committee of a lunatic tenant in quasi tail, under 1 Will. 4, c. 65, s. 13, has been held, in Ireland, not to bar the entail (*Batteste v. Maunsell*, 10 I. R., Eq. 314), because sect. 15 of that act makes express provision for re-establishing the uses and trusts to which the surrendered lease was subject. *Ib.* 325.

Where, however, the lessor of a lease for lives renewable for ever vested in a lunatic as quasi tenant in tail, in pursuance of the Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105), made a fee farm grant to the committee of the lunatic, it was held that the lunatic's estate in quasi entail was barred, as the 17th section of the act substitutes the committee for the lunatic, and enables the committee to do every act which such owner, if not under disability, might have done. *Batteste v. Maunsell*, 10 I. R., Eq. 314, 325.

The concurrence, however, of the tenant for life in a conveyance with the quasi tenant in tail in *remainder*, is necessary in order to bar the subsequent limitations (*Wastneys v. Chappel*, 3 Bro. P. C. 50, Toml. Ed.; *The Duke of Grafton v. Hanmer*, 3 P. Wms. 266, n.; *Slade v. Pattison*, 5 L. J., N. S. 51; *Edwards v. Champion*, 3 De Gex, Mac. & G. 202), though it seems it is not necessary that he should be a conveying party (*Allen v. Allen*, 2 Dru. & Warr. 335); so in the converse case, if the quasi tenant in tail concurs in a conveyance by the tenant for life, the remainderman will be barred. *Norton v. Frecker*, 1 Atk. 524; West, Rep. t. Hardw. 203.

Moreover, by analogy to the rule in the case of estates of inheritance, although a quasi tenant in tail in remainder without the concurrence of the tenant for life cannot bar a remainderman, he has power to bar himself and his issue. *Allen v. Allen*, 2 Dru. & Warr. 337; *Walsh v. Studdert*, 5

I. R., C. L. 487; 7 I. R., C. L. 482.

How far Occupancy applies to Copyholds.

The principle of *general occupancy* at common law was not applicable to copyholds, because, as the freehold is in the lord, there was no estate vacant upon which the first comer could enter without invading the interest of another party. *Ven v. Howell*, 1 Roll. Abr. 511 (L), pl. 3; *Smartle v. Penhallow*, 6 Mod. 63; 1 Salk. 188; 2 Ld. Raym. 994; 3 Salk. 181; *Withers v. Withers*, Amb. 152; *Zouch d. Forse v. Forse*, 7 East, 186; *Doe v. Robinson*, 2 Man. & Ry. 266, n.; *Doe d. Foster v. Scott*, 4 Barn. & Cress. 714; 7 Dowl. & Ry. 190.

There may, however, be a *special* occupancy of copyholds either with (*Doe v. Goddard*, 1 Barn. & Cress. 522; *Right v. Bawden*, 3 East, 276, 277) or without (*Doe d. Lempriere v. Martin*, 2 Black. 1148; and see *Howe v. Howe*, 1 Vern. 415; *Rundle v. Rundle*, 2 Vern. 264) a special custom. See *Pickersgill v. Grey*, 31 L. J. (Ch.) 394.

It will be observed, that by the 6th section of 1 Vict. c. 26, which is hereafter set forth, that where there is no special occupant of copyholds, they will go to the executors or administrators as personal estate.

Law as settled by 1 Vict. c. 26, ss. 6, 34.

The 12th section of 29 Car. 2, c. 3, and the 9th section of 14 Geo. 2, c. 20, were repealed by the 1 Vict. c. 26, which enacts, that if

no disposition by will shall be made of any estate pour autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate pour autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy, or by virtue of this act, it shall be assets in his hands, and shall go, and be applied and distributed, in the same manner as the personal estate of the testator or intestate (s. 6). By the 34th section of the same act, it is provided that the act shall not extend to any estate pour autre vie of any person who shall die before the 1st day of January, 1838.

In construing the 6th section of the Wills Act, the words "in case there shall be no special occupant" include both the case where there is no special occupant named in the grant, and also the case where the heir is named as special occupant, but the grantee of the estate or rent-charge pur autre vie dies without leaving an heir. See *Plunket v. Reilly*, 2 Ir. Ch. Rep. 585. There a rent-charge was granted to J. Moore and his heirs, charged on land held for lives, with a covenant

for perpetual renewal. J. Moore died intestate and without heirs. It was held by the Master of the Rolls for Ireland that his administratrix was entitled to the rent-charge.

And there may be a special occupant of an estate pour autre vie vested in trustees. Thus in the recent case of *Reynolds v. Wright*, 2 De G., F. & J. 590, Elizabeth S. was lessee of lands granted to her and her heirs and assigns for the lives of three persons and the life of the survivor. She made a will, leaving this property to two trustees in trust for J. S. B., his heirs and assigns, and died leaving the trustees and J. S. B. surviving. J. S. B. died intestate and without heirs. It was held by Lord Campbell, L. C., affirming the decision of Sir J. Romilly, M. R., (reported 25 Beav. 100), that the leaseholds pour autre vie passed under the 6th section of the Wills Act to the administrator of J. S. B., and did not belong to the trustees.

An estate pour autre vie will be liable to legacy duty, and will not be exempted therefrom by the foreign domicile of the tenant. See *Chatfield v. Berchtoldt*, 7 L. R., Ch. App. 192.

It seems, notwithstanding the legislation against general occupancy, it may for a limited period subsist in one case. Suppose a tenant pour autre vie dies intestate; until administration is taken out, the estate must go either to the first person who takes possession as general occupant, or to the administrator by relation back from the time of his taking out letters of administration to the death of the tenant pour

autre vie. Mr. Preston thought that the former hypothesis was most consistent with our system of tenures, which so carefully guards against the abeyance of the freehold. 1 Prest. Convey. 44, 45.

Order to produce Cestui que vie.

It may be here mentioned that, upon the application of any person having any claim in remainder, reversion or expectancy, the Lord Chancellor or a Vice-Chancellor, by 6 Anne, c. 18, may order the cestui que vie to be produced (*Ex parte Grant*, 6 Ves. 512; *Ex parte Whalley*, 4 Russ. 561; *Re Isaac*, 4 My. & Cr. 11; *Re Lingen*, 12 Sim. 104; *Re Clossey*, 2 S. & Giff. 46); but the Master of the Rolls has no jurisdiction (*Meyrick v. Lawes*, 23 Beav. 449). As to mode of procedure, see Smith's Ch. Prac. 1147, 7th ed.; 1 Seton, Decrees, 521, 3rd ed. Pemberton on Judgments, 622, 2nd ed.

III. *Estate Tail after Possibility of Issue extinct.*

A tenancy in tail after possibility of issue extinct is, where lands, having been limited in *special* tail, and one of these parties from whom the issue is to proceed dies without issue, in that case the survivor becomes thereupon tenant in tail after possibility of issue extinct (Litt. s. 32). Thus, if lands are limited to a man and woman and the heirs of their two bodies, or to a man and the heirs of his body begotten on the body of his wife, in the former case on the death of either husband or wife, and in the latter case on the death of the wife,

without issue, the survivor will be tenant in tail after possibility of issue extinct. Litt. ss. 33, 34.

Although, upon the death of the survivor, if there be issue living, such survivor would be tenant in tail, nevertheless, on the death of such issue without issue inheritable under the entail, the survivor will become tenant in tail after possibility of issue extinct. Litt. s. 32.

This estate is so called because it is evident that the tenant can by no possibility have any issue inheritable to the same estate tail. The mere improbability of a man and wife having children where land is settled upon them and the heirs of their two bodies, (as if they live to the age of 100 years and have no issue,) will not change their tenancy in tail to a tenancy in tail after possibility of issue extinct, for the law sees no impossibility of their having children (Co. Litt. 28a). Upon the same principle in *Platt v. Powles*, 2 Mau. & Sel. 65, where a testator devised a reversion to his wife for her life, and after her decease to the heirs of her body by him (the testator) lawfully begotten, and for want of such issue remainder over. Although there was no issue of the marriage *at the time of the death* of the testator, it was held, that the wife was tenant in tail after possibility of issue extinct. "There was a *possibility*," said Dampier, J., *during the whole period of gestation*, that she might have issue; and the event cannot vary it. It is the possibility and not the probability to which the law looks, and here the possibility was not at all more remote than that which exists be-

tween parties of an age past child-bearing."

This estate must arise by operation of law, or, as Coke terms it, "by act of God," and that by dying without issue, and not by the act or limitation of the parties. Thus, if land be given to a man and to his wife, and to the heirs of their two bodies, and afterwards they are divorced *causâ præcontractûs*, or *consanguinitatis*, or *affinitatis*, their estate of inheritance is turned to a joint estate for life; and albeit they had once an inheritance in them, yet as the estate is altered by their *own act* and not by the act of God, as by the death of either party without issue, they are not tenants in tail after possibility of issue extinct. Co. Litt. 28 a; 1 Roll. Abr. 841.

A person may be tenant after possibility of a remainder as well as of an estate in possession. Thus, as is laid down in the principal case, "if a lease for life is made, remainder to the husband and wife in special tail, if the husband dies without issue, the wife is tenant in tail after possibility of the remainder; and if the tenant for life surrenders to her, she becomes tenant in tail after possibility in possession;" ante, p. 42.

Lord Eldon remarks, that, "in *Lewis Bowles's Case*, the limitation was to the husband and wife for their joint lives; and both of them, as the joint estate was so expressed, were unimpeachable of waste; with remainder to the male issue of the marriage; under which limitation the issue were purchasers; and there is a limitation to the heirs of the body of the husband and wife,

with remainder over; and it was held, that *until* issue born they were tenants in tail in possession, though the limitation to them was expressly for their lives without impeachment of waste, yet they had an estate tail with all its incidents until severance by the birth of issue; upon which event, having been tenants in tail before, they became tenants for life without impeachment of waste, with remainder to their issue male, &c. Therefore, by virtue not only of those word, 'without impeachment,' &c., but also by virtue of the incidents to the estate tail in possession, there being no trustees to preserve, &c., they might have barred all the remainders behind, and had all the rights of tenant in tail in possession." *Williams v. Williams*, 15 Ves. 424.

With regard to the *quantity* of this estate, it is shown in the principal case from various incidents, that it is the same as that of tenant for life (ante, p. 41); it is also shown that a tenant in tail after possibility of issue extinct has certain *qualities and privileges* annexed to his estate, such as a tenant in tail has, and a tenant for life has not. The principal and perhaps the only one of any importance at the present day is that he is punishable for voluntary waste, as for cutting timber; and although there was once a doubt upon the subject (4 Co. 63 a), it seems that he is also entitled to the property of the timber he may have cut (*Williams v. Williams*, 15 Ves. 419; 12 East, 209); but he will be restrained from committing wilful and malicious waste; post, p. 115.

The privileges of tenant in tail

after possibility of issue extinct, are in respect of the *privy of his estate*, and of the inheritance that was once in him; if, therefore, he convey his estate over to another, such person will be considered as a mere tenant for life. Co. Litt. 28 a; *George ap Rice's Case*, 3 Leon. 241.

It may be here mentioned that the power of disposition given by the Fines and Recoveries Act (3 & 4 Will. 4, c. 74) does not extend to tenant in tail after possibility of issue extinct. Ib. s. 18.

IV. *Curtesy.*

Of what Property a Man can be Tenant by the Curtesy.

Where a woman is seised of an estate of freehold of inheritance either in fee simple or fee tail, her husband (who by virtue of his marital right at common law, now partially affected by sect. 8 of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), see post, p. 61, would be entitled to the estate for *her* life only) will, upon birth of issue which might by possibility inherit the estate, be entitled to an estate for his own life, as tenant by the curtesy (Litt. ss. 35, 52); "as high an estate," as is observed in *Lewis Bowles's Case*, "as that of lessee for life." *Board v. Board*, 9 L. R., Q. B. 48.

And curtesy being an inseparable incident annexed by law to the estate of inheritance of a woman, it cannot be barred by condition. *Sir Anthony Mildmay's Case*, 6 Co. 41 a; Co. Litt. 224 a; and see *Voller v. Carter*, 4 Ell. & Bl. 173; and see *Bennet v. Davis*, 2 P. Wms. 316, post, p. 62.

There can be no curtesy of copyholds, since the tenant has a mere estate at will in them (Gilb. Ten. 288; 4 Rep. 22 a), except by custom, which will be construed strictly. Cro. Eliz. 361; 2 Leon. 208.

Nor will there be curtesy of a reversion or remainder in fee expectant upon an estate of freehold, unless the particular estate determine during the coverture (Co. Litt. 29 a); nor of an estate pour autre vie. *Stead v. Platt*, 18 Beav. 50.

Where contingent remainders which do not take effect intervene between an estate for life and the reversion in fee in the wife, as the two estates will coalesce, the husband will be entitled as tenant by the curtesy; but if the contingent remainders take effect, the estates will again open to let in the contingent remainders, and thus the wife would have a mere life estate, of which the husband could not be entitled to curtesy. Thus, in *Boothby v. Vernon*, 9 Mod. 147, it is said by the Court, that where an estate for life is limited to a woman, remainder to her first and every other son in tail male, remainder to the heirs of her body, remainder to her right heirs; here it is plain that she is seised of the inheritance; yet if she hath a son, her husband shall not be tenant by the curtesy, because the contingent estate which is to arise upon her death intervenes between her estate for life and the inheritance. See also Year Book, 1 Edw. 3, pl. 14, 15; see also *Hooker v. Hooker*, Ca. t. Hardw. 13; 2 Barnard, 200, 232, 379; and see 2 Saund. 382 b, note; *Doe v. Seudamore*, 2 Bos. & P. 294.

The husband will be entitled as tenant by the curtesy, although an estate tail may have determined by the death of the issue as well as the wife (*Paine's Case*, 8 Rep. 34; *Steadman v. Pulling*, 3 Atk. 423, 427; Co. Litt. 30 a), or although the estate in fee simple of the wife, being subject to devise over, may have determined by the happening of the event upon which it was given over, as, for instance, the death of the wife under twenty-one without issue. *Buckworth v. Thirkell*, 3 Bos. & Pul. 652, n.

The husband will be tenant by the curtesy when his wife is one of several coparceners or tenants in common; *secus* if she be one of several joint tenants. Litt. s. 45; 2 Roll. Ab. 90, pl. 50.

So likewise of incorporeal hereditaments of which the wife is seised, as rents, advowsons, commons. Co. Litt. 30 b.

The new law of inheritance, 3 & 4 Will. 4, c. 106, does not, it seems, prevent a husband from becoming tenant by the curtesy to any estate which his wife has inherited. Williams's Real Prop. 204, note (a), and Appendix E, 12th edit.

Nor will the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), although it interferes with the old marital right of the husband to the rents of lands which descend to her during her life, affect his right as tenant by the curtesy after her death. See sect. 8, which enacts, that "where any freehold, copyhold or customaryhold property shall descend upon any woman married after the passing of this act as heiress or co-heiress of an intestate, the rents and profits of such

property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipt alone shall be a good discharge for the same."

Curtsey of an Equitable Estate.

Courts of Equity, acting by analogy to Courts of Law, have held that the husband is entitled as tenant by the curtesy when the estate of inheritance of the wife is equitable, as when it is a trust estate of land (*Watts v. Ball*, 1 P. Wms. 108), or of money to be laid out in land (*Cunningham v. Moody*, 1 Ves. 174; *Sweetapple v. Bindon*, 2 Vern. 536; *Dodson v. Hay*, 3 Bro. C. C. 404), or an equity of redemption (*Casborne v. Scarfe*, 1 Atk. 603; 7 Vin. Abr. 156; 2 J. & W. 194).

And the mere fact that the rents and profits are directed to be paid to the wife, during coverture, to her separate use, will not exclude the husband on her death from the enjoyment of his general right as tenant by the curtesy in the equitable inheritance of his wife. *Roberts v. Dixwell*, 1 Atk. 607, and see *Pitt v. Jackson*, 2 Bro. C. C. 51; *Morgan v. Morgan*, 5 Madd. 408; *Follett v. Tyrer*, 14 Sim. 125; *Harris v. Mott*, 14 Beav. 169; *Appleton v. Rowley*, 8 L. R., Eq. 139; overruling on this point *Hearle v. Greenbank*, 3 Atk. 715. The case of *Moore v. Webster*, 3 L. R., Eq. 267, seems to have been wrongly decided by Sir J. Stuart, V.-C., against the husband's right to curtesy as the wife was seised of the whole equitable fee. See the remarks of Sir R. Malins, V.-C., in *Appleton v. Row-*

ley, 8 L. R., Eq. 143, and *Cooper v. Maedonald*, 7 Ch. D. 297.

Where a married woman has an equitable fee to her separate use, she may dispose of it either by deed or will as against both her husband's estate by the curtesy and as against the estate of her son as heir. (*Cooper v. Maedonald*, 7 Ch. D. 288, 296); but, in the absence of such disposition, the right of the husband and the heir will be unaffected. *Ib.*

And where a married woman is equitable tenant in tail to her separate use, the restraint upon anticipation will not prevent her from barring the estate tail, with the concurrence of her husband, under the 40th section of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), and acquiring an equitable fee to her separate use, which she has power to devise so as to defeat her husband's tenancy by the curtesy. *Cooper v. Maedonald*, 7 Ch. D. 288.

The husband may in equity be excluded from curtesy by the express terms of the instrument giving an estate to his wife. Thus in the case of *Bennet v. Davis*, 2 P. Wms. 316, where a man devised lands to his daughter for her separate and peculiar use, exclusive of her husband, to hold the same to her and her heirs, and that her husband should not be tenant by the curtesy, nor have these lands for his life, in case he survived, but that they should upon the wife's death go to her heirs, it was held by Sir Joseph Jekyll, M. R., that although at law the husband might be tenant by the curtesy, yet he was merely a trustee, and was bound to convey to

a trustee for the separate use of the wife and to her heirs.

The husband, however, will not be excluded from his right to curtesy unless the intention be clear. *Steadman v. Pulling*, 3 Atk. 423, 427.

When Alien may be Tenant by the Curtesy.

Formerly, if the husband were an alien he would not be entitled as tenant by the curtesy, unless he were either naturalized or made a denizen.

If he were naturalized, inasmuch as the effect of naturalization (unless it was limited in its operation) was retrospective, he would be entitled by the curtesy, whether issue were born before or after he was naturalized. *Fish v. Klein*, 2 Mer. 432; *Fourdrin v. Gowdey*, 3 My. & K. 401.

If the husband were made a denizen he would not, it seems, be entitled where the only issue had been born abroad, inasmuch as such issue could not inherit from their mother (*Doe v. Jones*, 4 T. R. 300); but when the issue had been born in this country, even previously to the husband being made a denizen, inasmuch as the issue could inherit the lands of the mother, and the personal disability of the husband to hold land ceased on his denization, he was entitled to claim as tenant by the curtesy, not only the lands which the wife acquired subsequently to his becoming a denizen, but those of which she was seised before that event. See 1 Bright, *Husb. & Wife*, 125.

However, it seems now that an alien, married after the passing of the Naturalization Act, 1870 (33

& 34 Vict. c. 14), will be tenant by the curtesy, although he may not have been naturalized or made a denizen; see sect 2, which enacts that "real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner and in all respects as by a natural-born British subject. . . . Provided that this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of the act, or in pursuance of any devolution by law on the death of any person dying before the passing of this act." See also 7 & 8 Vict. c. 16.

Legal Marriage requisite.

Legal marriage is essential before a man can claim as tenant by the curtesy. Co. Litt. 30 a.

Formerly, if a man married and had issue by an idiot, found so afterwards by office, the lands might be seized by the king, for as the title of tenancy by the curtesy and of the king began at one instant, the title of the king was preferred (Co. Litt. 30 b); but now, as the marriage would be void *ab initio*, the title of the husband by curtesy would never arise. *Morrison's Case*, cited 1 Hag. Consist. Rep. 417.

Seisin requisite.

There must be an actual seisin, or seisin in deed of the wife, as Cœke terms it, where it is attainable, in order to entitle the husband to be tenant by the curtesy. Thus,

if a wife having had issue dies before she made an entry upon her inheritance, the husband, although she was seised in law, will not be tenant by the curtesy (Co. Litt. 29 a; 6 T. R. 680); though if the seisin be but momentary it will be sufficient (*Parker v. Carter*, 4 Hare, 418). So if the wife, after having had seisin, was disseised before marriage, and no entry was made during the coverture, the husband will not be entitled as tenant by the curtesy (Perk. s. 458); *secus* if the disseisin took place after marriage. Ib.

Actual seisin where attainable is not rendered unnecessary by 3 & 4 Will. 4, c. 106, s. 2. 1 Bright, Husb. & Wife, 117, note.

Although formerly the possession of one tenant in common was the possession of all, so as to entitle the husband of another to be tenant by the curtesy (*Sterling v. Penlington*, 7 Vin. Abr. 150, pl. 11), the law is now altered. 3 & 4 Will. 4, c. 27, s. 12. See *Culley v. Doe d. Tayler-son*, 11 Ad. & Ell. 1008; *Doe d. Holt v. Horrocks*, 1 Car. & K. 566.

Seisin at law will be sufficient, if actual seisin is unattainable. Thus where a man dies seised of an advowson or rent in fee which descends to a daughter, a married woman, who hath issue, and dies seised before the rent became due or the church became void, although she had but a seisin in law, her husband will be tenant by the curtesy, because he could by no industry attain to any other seisin. Et impotentia excusat legem. Co. Litt. 29 a.

According to Perkins the husband

shall have curtesy in an advowson, though he suffers the ordinary to present by a lapse on an avoidance in his wife's lifetime (Perk. sect. 468), but such a case is not within Lord Coke's reason for allowing curtesy of an advowson without seisin in deed. Co. Litt. 29 a, note 5, Harg. & Butl. ed.

It is clear, however, that if an advowson be appendant to a manor, and there have been no entry upon the manor during the coverture, the husband shall not be tenant by curtesy of the advowson, which is merely accessory to the manor of which seisin might have been had. Note to Co. Litt. 29 a; Hale's MSS.

If, however, the inheritance of the wife be subject to a lease for years, actual entry or receipt of the rents is unnecessary to entitle the husband as tenant by the curtesy, inasmuch as the possession of the lessee is the possession of the wife. *De Grey v. Richardson*, 3 Atk. 469; and see Co. Litt. 29 b.

Courts of Equity acting by analogy to Courts of Law required an equitable seisin, such as the receipt of the rents and profits by the husband, in order to entitle him to be tenant by the curtesy of the wife's equitable estate. *Casborne v. Scarfe*, 1 Atk. 603; 7 Vin. Abr. 156; *De Grey v. Richardson*, 3 Atk. 472; *Casburne v. Inglis*, 2 J. & W. 194; 4 Hare, 405. And see *Watts v. Ball*, 1 P. Wms. 108; *Stone v. Godfrey*, 1 Sm. & Giff. 590; 5 De Gex, Mac. & G. 76.

If the coverture begins after an adverse possession has commenced, and terminates during the continuance of such adverse possession,

or, if both the trustee and cestui que trust are disseised before the equitable estate of the wife begins, by a party claiming by a title paramount to the trust who retains possession until after the death of the wife, the husband would not acquire any title as tenant by the curtesy. *Parker v. Carter*, 4 Hare, 400, 416.

Although the right of the husband as tenant by the curtesy of an equitable estate of the wife may be excluded by a possession of the estate strictly adverse to the husband and wife, and to all other parties interested under a settlement during the whole period of coverture, yet the possession of the estate in conformity with the equitable interests of the cestui que trusts, for however short a time during the coverture, and after the interest of the wife has become vested in possession, will support the title of the husband as tenant by the curtesy. *Parker v. Carter*, 4 Hare, 400.

So the possession of the cestui que trust under the trusts of a settlement is the possession of the trustee, and gives him a seisin of the estate, which is not interrupted by the death of the cestui que trust, but immediately enures for the benefit of the person next entitled to the equitable interest, and, notwithstanding the adverse possession of another party soon afterwards commenced, the Court cannot presume such adverse possession to have commenced so instantaneously on the death of the first cestui que trust, as wholly to exclude the equitable seisin of the parties next entitled to the beneficial interest. *Ib.*

Birth of inheritable Issue requisite.

The wife must have issue by the husband, such as by possibility may inherit the estate, otherwise the husband will not be tenant by the curtesy. Thus if an estate be limited to a woman and the heirs male of her body, and she have issue only a daughter, the husband will not be tenant by the curtesy, as there was no issue born who could by possibility inherit the estate. So likewise if the limitation be to her and the heirs female of her body, and she have issue only a son (Co. Litt. 29 b). So if an estate be limited to a woman and the heirs of her body by A., her then husband, and upon the death of A. she marries B., although she has issue by B., yet as such issue could not by any possibility inherit the estate, B. will not be tenant by the curtesy (Perk. s. 465; 8 Co. 35 b; Co. Litt. 29 b). *Secus*, if the wife had been seised in fee of an estate, even if there had been issue by the prior marriage. 2 Bro. Tenant per le Curtesy, 8.

Nor will the husband be tenant by the curtesy where the issue claim by purchase and not by descent. *Sumner v. Partridge*, 2 Atk. 45; *Barker v. Barker*, 2 Sim. 249, 252.

The issue must be born during the marriage; therefore where the child is born after the death of the mother, as is the case when the cæsarean operation has been performed, it is said by Lord Coke that the husband will not be tenant by the curtesy, because he cannot allege that he had issue *during the marriage* (*Paine's Case*, 8 Co. 35 a; Co. Litt. 29 b); but at the present day, a child

en ventre sa mère might now be considered for all purposes as in esse (*Thellusson v. Woodford*, 4 Ves. 323, 334; 1 Bright, Husb. & Wife, 124). "One of the difficulties, however, stated by Lord Coke, if it can be considered substantial, still exists. The estate, during the short interval after the death of the wife, descends to her next heir, and is not divested *ab initio* by the subsequent birth of the child" (1 Rep. Husb. & W. 31; *Basset v. Bassett*, 3 Atk. 207; *Goodtitle v. Newman*, 3 Wils. 516; 4 Ves. 335). But if issue be born either before the wife was seised, and entry is afterwards made, or even if issue have died in the life of the father before descent of the land, he will nevertheless be tenant by the curtesy. Co. Litt. 29 b; Perk. s. 473.

The issue must be born alive, but it is not essential that the child should be heard to cry out, as that is only one of the proofs that it is born alive, since motion, stirring, and the like, may be sufficient, especially when we consider that a child may be born dumb (Co. Litt. 29 a). As to evidence whether a child is born alive, see *Jones v. Ricketts*, 10 W. R. (M. R.) 576.

There is an exception to the general rule as to the necessity of the birth of issue in order to confer an estate by curtesy in the case of lands of gavelkind tenure; for in that case a husband who outlives his wife, whether he may have had issue by her or not, will, as long as he remains unmarried, be entitled for life to a moiety of the estate. Co. Litt. 30; Dav. 50; 2 Sid. 153; Rob. Gavelk. b. 2, c. 1.

T.L.C.

F

Death of Wife requisite.

Although for some purposes the estate of tenant by the curtesy is inchoate during the life of the wife, it is not complete until her death, (Co. Litt. 30 a); hence it has been held that he has not, during the life of his wife, such an estate of freehold in an estate of which she is seised in fee as would merge a term in the estate to which he is entitled in his own right. *Jones v. Davies*, 5 H. & N. 825; 7 H. & N. 509; 31 L. J. (Exch.) 116.

Incidents and Liabilities of Tenancy by the Curtesy.

Tenant by the curtesy is entitled to emblements (post, p. 103), liable for waste (post, p. 107), and he must keep down the interest of incumbrances on the estate. 1 Atk. 606; post, p. 97.

Previous to 8 & 9 Vict. c. 112, (which determined after the 31st of December, 1845, satisfied terms attendant upon the inheritance,) tenant by the curtesy was entitled to be relieved from a satisfied term of years set up by the heir at law as a bar to his title. *Snell v. Clay*, 2 Vern. 324.

The estate of the husband, as tenant by the curtesy, is only a continuation of that of his wife; hence if there are coparceners of an advowson, and they cannot agree to present, the law will give the presentment to the eldest; and on her death her husband, who is tenant by the curtesy, will have this privilege also. Co. Litt. 166 b.

How Curtesy may be defeated and barred.

The right of the husband to curtesy will be defeated by the birth

and entry of a posthumous brother of his wife; but his right to curtesy will be revived upon his re-entry during the marriage, after the death of the brother without issue. 2 Bro. Tenant per le Curtesy, fol. 249 b, pl. 13.

The husband's right to curtesy, where the wife's estate is defeasible by condition, may also be defeated by the entry of the donor for condition broken (1 Bright, Husb. & Wife, 152), or by the recovery of the wife's estate in an action against the husband and wife (Ib.), unless the recovery were reversed. Perk. s. 475.

A fine or recovery, in which the husband and wife joined, unless the fine were reversed, as, for instance, in consequence of the wife being under the age of twenty-one (*Charnocke v. Worsley*, Cro. Eliz. 129; Fitz. N. B. 21 d), would defeat the husband's title to curtesy.

The husband might also have defeated his right to curtesy, by a conveyance of his wife's estate by a conveyance having a tortious operation, as a feoffment, fine or recovery (Bright, Husb. & Wife, 154; Co. Litt. 30 b; 2 Bro. Tenant per le Curtesy, 6, 7; Vin. Abr. 162, pl. 2; Hob. 338); but now fines and recoveries are abolished (3 & 4 Will. 4, c. 74), and a feoffment has no longer a tortious effect. 7 & 8 Vict. c. 76, and 8 & 9 Vict. c. 106.

The wife, by eloping with an adulterer, forfeits, as we shall hereafter see (post, p. 80), her right to dower, but the husband's estate by curtesy will not be forfeited by his committing that offence. The reason of the difference is, that the statute of Westminster, cap. 2,

34 (13 Edw. 1, c. 34), by express words, under these circumstances, creates a forfeiture of dower; but there is no act inflicting in the other case the forfeiture of a tenancy by the curtesy. *Sidney v. Sidney*, 3 P. Wms. 269, 276.

The husband's attainder of treason or other capital felony would have disabled him from claiming curtesy (1 Bright, *Husb. & Wife*, 156; Co. Litt. 391). As to the effect of a pardon from the crown, see Bright, *Husb. & Wife*, 156, 157. See, however, now 33 & 34 Vict. c. 23 (4th July, 1870), by which forfeitures for felony and treason have been abolished.

The question has been raised, whether a wife can defeat her husband's title to curtesy out of an estate, by her election to take other property conferred upon her by a will, in which her own estate has been devised away from her by the testator. It appears, in the case of *Cavan v. Pulteney*, 2 Ves. jun. 560, to have been assumed by Lord Loughborough that she could do so, but as she elected in that case to retain her own estate to which she was entitled in tail, the question was not actually decided (see *S. C.*, 3 Ves. jun. 384; and *Long v. Long*, 5 Ves. 447). It seems difficult, however, to see upon what principle the wife has any power to elect, so as to bind her husband's legal right to curtesy, or how a Court of Equity can compel him to convey his legal right. See *Brodie v. Barry*, 2 V. & B. 127; *Halford v. Dillon*, 2 Brod. & Bing. 12; 1 Rop. *Husb. & Wife*, 30, note by Jacob; *Wall v. Wall*, 15 Sim. 513; 2 L. C. Eq. 406, 5th ed.

A husband tenant by the curtesy of an estate tail, which his wife elects to take in opposition to a will under which he also accepts benefits, will not be put to his election. *Lady Cavan v. Pulteney*, 2 Ves. jun. 544; 3 Ves. 384; see also *Brodie v. Barry*, 2 V. & B. 127.

The husband would formerly have been barred of curtesy if his wife were attainted of treason before the birth of issue, but not where inheritable issue had been previously born. Hale's Pl. Cr. 359, Curtesy, fol. 249 b, pl. 3; Bright, *Husb. & Wife*, 159.

If the wife were attainted of felony, the husband, nevertheless, would always have been tenant by curtesy in respect of the issue which he had before the felony, and which by possibility might have inherited (Co. Litt. 40 a); but formerly, if the wife had been attainted of felony before the birth of issue, the husband, although afterwards there were issue, would not have been tenant by the curtesy. *Ib.*

By 54 Geo. 3, c. 145, no attainder for felony, except for the crimes of high treason, petit treason (since abolished, 9 Geo. 4, c. 31, s. 2), or murder, or of abetting, procuring or committing the same, should extend to the disentitling of any heir, nor to the prejudice of the rights of any person, other than the offender during his natural life only. See also, 3 & 4 Will. 4, c. 106, s. 10.

And it seems that a pardon would not entitle a husband, whose wife was attainted of felony before the birth of issue, to claim curtesy (1 Bright, *Husb. & Wife*, 160; and see 1 Leon. 3, pl. 7; *Gate v. Wiseman*, Dyer, 140 b), except as to

lands acquired by the wife *after* pardon (Co. Litt. 392; Perk. s. 387); but he would be entitled to curtesy if her attainder were reversed, or she died before judgment. 4 Bl. Comm. 392; Co. Litt. 390 b; 1 Bright, *Husb. & Wife*, 161.

However, since the passing of 33 & 34 Vict. c. 23 (4th July, 1870), forfeitures for treason and felony have been abolished.

V. *Dower*.

Tenancy in dower at common law may now be generally defined as being the estate that a widow (if not barred of such estate) is entitled to have assigned to her for her life in one-third of the hereditaments, which her husband is seised of in fee simple or fee tail, and which her issue, if any, might by possibility inherit.

Dower is given to a woman for the sustenance of herself and the nurture and education of her children. Co. Litt. 30 b.

The law relating to dower has been very materially altered by the Dower Act (3 & 4 Will. 4, c. 105), as to women not married on or before the 1st day of January, 1834; it will therefore be necessary to state the law, both previous to and after the passing of that act.

It may be here mentioned, that dower *ad ostium ecclesie*, and dower *ex assensu patris*, which are fully described Co. Litt. 34 a—37 b, are now abolished, 3 & 4 Will. 4, c. 105, s. 13; Dower *de la pluís beale* (Co. Litt. 38 a—39 b), being merely a consequence of tenure by knights' service, was virtually abolished by the statute 12 Car. 2, c. 24, which converts such tenures into socage.

Before examining the requisites to dower we must see out of what kind of property a woman will be entitled to dower.

Out of what Property and Estate a Woman is entitled to Dower.

A widow will be entitled to dower, not only out of corporeal hereditaments of the husband, such as lands and houses, but also out of shares in public companies, being real estate (*Buckeridge v. Ingram*, 2 Ves. jun. 651; *Drybutter v. Bartholomew*, 2 P. Wms. 127); open mines (*Hoby v. Hoby*, 1 Vern. 218; *Stoughton v. Leigh*, 1 Taunt. 402), the proceeds of timber felled by the heir (*Bishop v. Bishop*, 10 L. J., Ch. (N. S.) 302; 5 Jur. 931; *Dickin v. Hamer*, 1 Drew. & Sm. 284), a mansion-house, though in its nature indivisible (*Gerrard v. Gerrard*, Ld. Raym. 72; 5 Mod. 64); and also out of incorporeal hereditaments, such as the profits of stallage, of a fair, of the office of Marshalsea, of keeping a park, of a piscary (Co. Litt. 32 a; so likewise out of rents (Ib.; Perk. s. 347), advowsons appendant or in gross (Co. Litt. 32 a; *Howard v. Cavendish*, Cro. Jac. 621), or commons (Co. Litt. 32 a), unless they be without stint. Co. Litt. 30 b, 30 a; Perk. s. 341.

A widow, however, will not be dowable out of real estate purchased in the name of her husband, with partnership property, for the purposes of partnership in trade, inasmuch as it is considered in equity, to all intents and purposes, as personal estate, and, therefore, not liable to dower (*Phillips v. Phillips*, 1 My. & K. 649; *S. C.* more fully stated, Bisset on Partnership, p. 50,

with some very able observations, elucidating the law on this subject. And see 1 L. Cas. Eq. 214, 5th ed.).

Nor is a widow entitled to dower out of a mere annuity not issuing out of land or tenements, although it be made payable to a man and his heirs, as out of the Post-office revenues (*Lady Holderness v. Marquis of Carmarthen*, 1 Bro. C. C. 377), or out of a subsisting rent or duty. *Earl of Stafford v. Buckley*, 2 Ves. 170; *Aubin v. Daly*, 4 Barn. & Ald. 59.

The quality of the property may be so affected by the election of third parties as to deprive the widow of dower. Thus, if even previous to the Dower Act the husband had before marriage given another person the option of purchasing certain land, if the option were exercised the land would thereby be converted into personalty, of which the widow could not claim dower, though otherwise she would be entitled to it. 7 Ves. 436; *Townley v. Bedwell*, 14 Ves. 591.

Again, in certain cases she must exercise her own option of what she will be endowed: if, for instance, her husband has made an exchange of lands, she will not be dowable both of the land given and the land taken by her husband in exchange; she must elect to be dowable of one of them. Co. Litt. 31 b; Perk. s. 319.

It must be remembered now that the dower of women not married on or before January 1st, 1834, will be defeated by the alienation of her husband. 3 & 4 Will. 4, c. 105, ss. 4, 14.

The estate of the husband, in

order to give his wife a title to dower, must be the *entire* inheritance, either in fee or in tail. Hence, a woman cannot be dowable of a reversion in fee where a previous life interest is in existence (Co. Litt. 32 b; 1 Roll. Abr. 677; *Duncomb v. Duncomb*, 3 Lev. 437; *Darcy v. Blake*, 2 S. & L. 387), nor where an estate for life or in tail intervenes between the life interest and inheritance of the husband (Perk. s. 335; 1 Roll. Abr. 677, pl. 15; *Doe d. Jones v. Jones*, 1 B. & C. 244); unless those estates terminate during the coverture, either by the death of the tenant for life or the death of the tenant in tail without issue, in which case, as the husband would have the whole of the inheritance, dower would attach. Perk. s. 337.

If, however, the intervening estate be vested in the wife during coverture, and she disclaim it (*Butler v. Baker*, 3 Co. Rep. 27; *Townson v. Tickell*, 3 Barn. & Ald. 31), or if the interposed interest be merely a chattel, as a term of years (*Bates v. Bates*, Id. Raym. 327), or a devise to executors for payment of debts previous to the inheritance to the husband (Co. Litt. 42 a), the widow would be entitled to dower, although in the latter cases she could not claim the enjoyment of it until the expiration of the term or until the debts of the deviser were paid off. *Hitchens v. Hitchens*, 2 Vern. 403; Perk. s. 335.

It seems that if the inheritance of the husband were dependent upon a contingent estate tail, if that did not vest, or if previous to 8 & 9 Vict. c. 106, the inheritance had

descended upon the husband tenant for life, and merged therewith so as to destroy a previous contingent remainder dependent upon the estate for life (*Hooker v. Hooker*, Cas. t. Hardw. 13; *Crump v. Wooley*, 7 Taunt. 362; 2 Barn. K. B. 200, 232, 379), the widow would be entitled to dower. Now, however, since 8 & 9 Vict. c. 106, the contingent remainders would not be destroyed. And see 40 & 41 Vict. c. 33.

If the husband have a general power of appointment previous to his estate of inheritance, his widow will be entitled to dower if the power be not exercised (*Cunningham v. Moody*, 1 Ves. 174; *Smith v. Camelford*, 2 Ves. jun. 698; *Doe v. Martin*, 4 T. R. 39; *Doe v. Weller*, 7 T. R. 478; *Maundrell v. Maundrell*, 10 Ves. 263, 265); but if he divest himself of his inheritance by the exercise of the power, even under the old law, his widow's claim to dower will be defeated. *Maundrell v. Maundrell*, 10 Ves. 265; *Ray v. Pung*, 5 Madd. 310; 5 Barn. & Ald. 561.

In general a widow will be entitled to dower of a defeasible estate of her husband so long as it exists; thus, under the old law, and when feoffments had a tortious operation, where a husband tenant for life made a feoffment in fee his widow would, as against the feoffee, be entitled to dower, because he having taken an estate in fee could not allege that the husband had only a limited interest, although her right would cease upon the entry of the person entitled in remainder or reversion after the determination of

the life interest. *Taylor's Case*, cited 1 Sir Wm. Jones, 317.

So under the old law, where a tenant in tail conveyed his estate by fine to a purchaser in fee, as the fine would bar the issue of the tenant in tail, but not those in remainder, the widow of the purchaser would be entitled to dower as long as there were issue of the tenant in tail; on failure of issue the remainderman might enter upon the estate and hold it free from her claim of dower. *Seymour's Case*, 10 Rep. 95 b, 96; *Doe d. Neville v. Rivers*, 7 T. R. 278.

The widow will be entitled to dower, although the estate of her husband determines by escheat for want of heirs (Jenk. 5). Where, however, the estate of the husband is defeated by a paramount title, as if he had been a disseisor, and the disseisee had entered upon him, the widow of the disseisor will be unable to claim dower. Litt. s. 393.

We have before seen that the widow of a tenant in tail will be entitled to dower, although the estate tail end on account of there being no issue; the reason is, that the estate of dower "is not derived merely out of the estate of the husband, but is created by the law, and by privilege and benefit of the law is annexed to the gift to him." *Paine's Case*, 8 Co. Rep. 36 a.

Hence, if an estate be given to a man in fee, with an executory limitation over if he should have no issue, his wife will be entitled to dower, notwithstanding he may have died without issue. See *Moody v. King*, 2 Bing. 447, where Best, C. J., in giving judgment,

observed that it had been said at the bar, that if the widow in such a case was held entitled to dower you must take it out of the estate of the person who had the executory devise, to whom she was a perfect stranger; that, however, was not so, as dower was part of the estate of the husband, as it was part of tenant in tail's estate, who died without issue, and not that of the remainderman. See also *Buckworth v. Thirkell*, 3 B. & P. 652, n. (a); *Smith v. Spencer*, 2 Jur. (N. S.) 778.

Under the old law the estate of which the husband was seised must have been *legal*, in order to entitle the wife to dower; she was not therefore dowable of an equity of redemption of an estate mortgaged in fee (*Dixon v. Saville*, 1 Bro. C. C. 326), nor of a trust estate (*Darcy v. Blake*, 2 S. & L. 387; *Kernaghan v. M'Nally*, 11 Ir. Ch. Rep. 52; 12 Ir. Ch. Rep. 89), where either the mortgage had been made or the trust created before the marriage, except perhaps in cases where the legal estate had been fraudulently conveyed away for the purpose of defeating dower. Gilb. Lex Præt. 267; see however *Swannock v. Lyfford*, Co. Litt. 208 a, n. 1.

Upon a merger, however, of the legal and equitable estates of inheritance during the coverture, the wife will even under the old law be dowable (*Selby v. Alston*, 3 Ves. 339); but the union of the legal and equitable estates must be complete (*Knight v. Frampton*, 4 Beav. 10), and commensurate (*Lyster v. Mahony*, 1 Dru. & Warr. 236). See however *Lloyd v. Lloyd*, 4 Dru. & Warr. 354, 370, where Lord St.

Leonards (then Lord Chancellor of Ireland) held, that where there was vested in the husband during coverture a bare legal fee simple upon which dower would attach at law, and an equitable estate tail, inasmuch as the whole legal fee simple would be exhausted to the extent of the equitable estate tail, and as the estate tail if legal would be liable to dower, in such case the widow would be entitled to dower, as a Court of Equity would not prevent her from enforcing her right at law. See also *S. C.* 2 Conn. & Laws. 592.

Where the husband had a bare legal estate, either as mortgagee in fee, after the estate had become absolute at law (*Park*, Dow. 100), or as trustee (*Noel v. Jevon*, Freem. Ch. Rep. 43; *Nash v. Preston*, Cro. Car. 191; 1 Roll. Abr. 679, pl. 50), as, for instance, where he had contracted to sell the estate before coverture, in which case he was a trustee for the purchaser (*Lloyd v. Lloyd*, 2 Conn. & Laws. 592; 4 Dru. & Warr. 355); the widow, although she might be entitled at law to dower, would have been restrained from proceeding there by a Court of Equity (*Noel v. Jevon*, Freem. 43; *Lloyd v. Lloyd*, 2 C. & L. 599; 4 Dru. & Warr. 370), unless it appeared that the trust was a mere fraudulent contrivance to defeat the creditors of the husband, who was the real owner of the estate (*Bateman v. Bateman*, 2 Vern. 436, Raithby's Ed.), and if the husband even after marriage entered into a valid contract to sell his equitable estate, the wife would not be entitled to dower, merely because *subsequently* the

legal estate vested in the husband.
4 Dru. & Warr. 370.

Although at the time a widow of a mortgagee in fee makes her claim to dower, in consequence of the lapse of time and other circumstances there may be no person entitled to redeem, yet if that state of things did not exist at the time of the husband's death his widow will not be entitled to dower. *Flack v. Longmate*, 8 Beav. 420.

We have before seen that a husband is entitled to curtesy of his wife's equitable estates; in order, therefore, to put an end to an anomaly, operating very unfairly towards women, it was enacted by 3 & 4 Will. 4, c. 105, "that when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in *equity* to dower out of the same lands." Sect. 2.

It has been held that as the Dower Act does not apply to copyholds, a widow is not entitled to freebench of an equitable estate in lands of that tenure (*Smith v. Adams*, 18 Beav. 499; 5 De G., Mac. & G. 712; *Powdrell v. Jones*, 2 Sm. & Giff. 407); but it has been decided that the act applies to gavelkind lands, and consequently that a widow is entitled to dower of an equitable estate therein. *Farley v. Bonham*, 2 J. & H. 177.

Under the old law, where there was a legal term for years, created before the right to dower attached, the widow could, at law, only obtain judgment with a cesset executio during the term (*Maundrell v. Maundrell*, 7 Ves. 567; 10 Ves. 246). In the case, however, of a satisfied term, a Court of Equity would prevent either the heir or devisee of the husband, or any other *volunteer*, from setting it up at law (*Ib.*); but not a purchaser for *valuable consideration*, even with *notice*, of the right to dower (*Mole v. Smith*, 1 J. & W. 665); and upon a sale would even compel him to accept the title and to take an assignment of the term, as a sufficient protection against dower (*Ib.*). In a recent case, a husband, married before the passing of the Dower Act, was seised in fee of real estate, subject to a term of five hundred years, vested in trustees upon trust to secure life annuities, a gross sum of 1,000*l.*, and to pay him half the surplus rents. It was held by Sir John Romilly, M. R., that the widow was entitled to have her dower assigned at once by metes and bounds. "I think," said his Honor, "her right to have dower assigned is incident to the fact that she has a present right to dower, though it is true it cannot be enjoyed during the term." *Sheaf v. Cave*, 24 Beav. 259. It must be remembered that, after the 31st December, 1845, satisfied terms, upon becoming attendant on the inheritance, absolutely determine. 8 & 9 Vict. c. 112.

We must now consider what are the requisites to dower.

Legal Marriage requisite.

First. There must be a legal marriage in order to entitle the wife to dower (Mod. 226; Perk. s. 304); but if it be only voidable, until it have been legally dissolved, her right will still remain. *Rennington v. Cole*, Noy's Rep. 29; and see Co. Litt. 33 a.

Formerly an alien woman, except in the case of the Queen Consort, was not dowable; but by a special act of parliament not printed, Rot. Parl. 8 Hen. 5, n. 15, all women aliens, who from thenceforth should be married to Englishmen by licence of the King, are enabled to demand their dower after the death of their husbands, to whom they should in time to come be married, in the same manner as Englishwomen. See Co. Litt. 31 b, and Note 187, Ib.

However, all alien women married to natural-born subjects became entitled to dower under 7 & 8 Vict. c. 66, which enacts: That any woman married or who should be married to a natural-born subject or person naturalized, should have all the rights and privileges of a natural-born subject (Sect. 16). This act is repealed by 33 Vict. c. 14, by which aliens can take and hold property like natural-born British subjects.

Possibility that Issue of Wife might inherit requisite.

Secondly. Although the birth of issue is not requisite in order to give the wife a title to dower, it is essential that the hereditaments of the husband be such as that the issue of the wife, if any, may by possibility inherit. Thus if lands

be settled upon a man and the heirs of his body by a woman then his wife, and he die during her lifetime, without issue by her, she will nevertheless be entitled to dower, as she might have had issue inheritable to the lands. If, however, in the case put, the wife died first, and the husband married again, the second wife would not be entitled to dower, because her issue could by no possibility inherit (Litt. s. 53). The advanced age of the wife, or the tender age of the husband, at the time of the marriage, will be no objection to the wife's claim of dower, as the law will not presume an impossibility of her having inheritable issue. Co. Litt. 40 a.

Seisin of Husband under the old Law requisite.

Thirdly. Another requisite to dower under the law before the Dower Act (which is inapplicable to women married on or before January 1, 1834) is *seisin* of the husband before his death; but, in this respect differing from tenancy by the curtesy, actual seisin is not indispensable. If, for instance, lands and tenements descended to the husband, and he died before entry, although he had only a seisin at law, nevertheless the wife would be entitled to dower: "for," observed Coke, "it lieth not in the power of the wife to bring it to an actual seisin, as the husband may do of his wife's land, when he is to be tenant by the curtesy, which is worthy the observation." Co. Litt. 31 a.

Where, however, before the act, the husband had no seisin at law, a mere right of entry (Perk. ss. 368,

369), or right of action (Perk. ss. 370, 375), would not give his widow a right to dower.

Under the Dower Act, "when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced."

3 & 4 Will. 4, c. 105, s. 3.

The Dower Act does not apply to freebench. Therefore where a purchaser of a copyhold held of a manor, the custom of which entitled widows of the copyholders to freebench in one moiety of the lands of which their husbands died seised, took a surrender, but died before admittance, it was held that his widow was not entitled to freebench at law or in equity. See *Smith v. Adams*, 5 De Gex, Mac. & G. 712, reversing the decision of Sir John Romilly, M. R., reported 18 Beav. 499.

The seisin of the husband must, previous to the Dower Act, have been *sole*; and indeed, subsequently to the act, the wife is only dowable of lands of which her husband was *solely entitled*. Thus if a husband was one of two *joint tenants* in fee, and he either conveyed away his interest, or died so that it survived to the other, his widow neither before nor after the act would be entitled to dower (Co. Litt. 30, 31 b); of course if the husband were the survivor his wife would be entitled

to dower (*Broughton v. Randall*, Cro. Eliz. 503). Where, however, the husband is one of two or more tenants in common, his wife will be entitled to dower, inasmuch as each has a several freehold and inheritance descendible to his heir (Co. Litt. 37 b); and after a partition a widow will be entitled to dower of the entirety allotted to her husband. *Reynard v. Spence*, 4 Beav. 103.

The necessity for a sole seisin of the husband during the old law gave rise to many devices amongst conveyancers, in order to prevent the right to dower attaching upon land purchased by a man, by conveying it to him and a trustee jointly in various manners, in order to prevent the obstacles to alienation which might arise from the wife being unwilling to release her right to dower, and also the expense which was necessarily occasioned by her doing so, by joining with her husband in a fine or recovery, the only mode by which formerly (before 3 & 4 Will. 4, c. 74) that object could be effected. See Hayes's *Introd.* 259, 260.

The usual limitations, however, by which dower was prevented from attaching upon hereditaments, was by their conveyance "to such uses as the owner should appoint, and, in default of appointment, to him for life; and, on the determination of his estate in his lifetime, to a trustee and his heirs for the life of the owner, in trust for him; and, on the determination of the estate of the trustee, to the owner and his heirs." These were termed common uses to bar dower, and by their means the owner was enabled

to alien without the assistance of his trustee, for an execution of the power entirely defeated the subsequent uses. *Ib.* 261, 262; see *Col-lard v. Roe*, 4 De G. & Jones, 525.

These limitations would not bar the dower of a widow married after the Dower Act came into operation. See 3 & 4 Will. 4, c. 105, s. 2; *Fry v. Noble*, 20 Beav. 598; 7 De Gex, Mac. & G. 687; *Clarke v. Franklin*, 4 K. & J. 266.

Death of Husband requisite.

The last requisite to dower is the decease of the husband (*Litt. sect.* 36), and it is stated in the old law books, that the wife of a man who is banished by abjuration, or by act of parliament, shall recover her dower, as this is a civil death (*Park, Dower*, 249); but it is laid down by Coke, that, "if the husband entered into religion, the wife shall not be endowed until he be naturally dead." *Co. Litt.* 33 b.

It seems to have been the old law that, where it could not be made to appear positively that the husband was dead, as where he was absent beyond seas, and no intelligence of him could be obtained, the wife might recover dower conditionally, viz., that if he did return from beyond seas, she should render back her dower to the feoffee of her husband, without suit, and receive the profits in the meantime with sufficient sureties on her part to do the same, or otherwise the tenant to keep the land. *Park, Dower*, 247.

How Dower barred.

Before the Statute of Uses (27 Hen. 8, c. 10), a man could not

prevent dower from attaching to a legal estate of which he was seised; and the only mode by which he could prevent his wife from claiming dower, and one which was very general, was by vesting the legal estate in feoffees, who (if desired so to do) conveyed to the wife an estate in lieu of dower, in other words, a jointure. *Vernon's Case*, 4 Co. Rep. 2.

When the Statute of Uses was passed, by which the seisin was transferred to the use, it was thought necessary to prevent widows having dower in addition to their jointures, and also to enable men in future to make valid jointures, so as to prevent dower attaching upon a legal estate. It was, therefore, by sects. 6, 7, 8 and 9 of the Statute of Uses in effect enacted, that where a woman had a jointure, she should not be entitled to her dower also; but if she were evicted of her jointure, her dower should revive; and that if the jointure should be made after marriage, she should have her election, when the coverture had ceased, to have either her dower or her jointure, but not both.

To constitute a valid legal jointure within the statute, six things are requisite:—First, that the jointure by the first limitation is to take effect for the widow's life in possession of profit presently after the decease of her husband. Secondly, that it be for the term of her own life or a greater estate. Thirdly, it must be made to herself and to no other for her. Fourthly, it must be made in satisfaction of her whole dower, and not of part of her dower. Fifthly, it must either be expressed or

averred to be in satisfaction of her dower. And sixthly, it may be made either before or after marriage, but if it be made after marriage she may waive it (Co. Litt. 36 b; and see *Vernon's Case*, 4 Co. Rep. 2; 1 Chitt. Stat. 1085, and cases there cited); and a proper jointure before marriage would be binding upon the wife although an infant at the time of the marriage (*Drury v. Drury*, 2 Eden, 57; 3 Bro. P. C. 492, Toml. ed.; 4 Bro. C. C. 506, n.); and if a jointure be competent, it will be good although not in proportion to the value of dower. *Ib.*; see Wilm. Op. 209; *Harvey v. Ashley*, 3 Atk. 612.

Dower, however, may, since as well as before the Statute of Uses, be barred by a provision, which would be enforced in equity, and this equitable bar does not proceed upon any analogy to the legal bar, but rests upon the foundation of *contract*; thus, for instance, where an agreement has been made between husband and wife *before* marriage, by which another provision was substituted for it, such agreement will be enforced by a Court of Equity, even where the wife was a minor, if the provisions were made with the assent of her father or guardian, whatever may be the nature of the property, and even though the provision in lieu of dower may have failed. *Buckinghamshire v. Drury*, 2 Eden, 74; *Corbet v. Corbet*, 1 S. & S. 621; *Simpson v. Gutteridge*, 1 Mod. 613; *In re Dwyers, Minors*, 13 Ir. Ch. Rep. 431; *Pennefather v. Pennefather*, 6 Ir. R., Eq. 171. In the well-considered case of *Dyke*

v. Rendall, 2 De G., M. & G. 209, by a settlement made on the marriage of an adult female, it was declared, that in consideration of the intended marriage, and for providing a competent jointure and provision of maintenance for "the wife and the issue of the marriage," the father of the husband had paid to him 3,000*l.*, and that the husband had given a bond for the payment of 2,000*l.* six months after the marriage, to be settled on trusts for the benefit of himself, his wife, and the issue of the marriage. During the coverture the husband bought certain lands, which he subsequently sold to a purchaser, from whose devisees the defendant purchased with notice of the settlement. The husband died without satisfying the bond. On a bill filed by the wife for dower out of the lands so sold, it was held by Lord St. Leonards, C. (overruling *Power v. Sheil*, 1 Moll. 296), that her right was barred by the settlement, and that she had no lien on, or right to resort to, the lands for the satisfaction of the amount due on the bond. "If the present," said his Lordship, "were a jointure operating as a bar under the Statute of Uses, the case would have been governed by the 7th section of that statute, but *in equity the bar rests solely on contract*, and my opinion is, that in this court, if a woman, being of age, accepts a particular something in satisfaction of dower, she must take it with all its faults, and must look at the contract alone, and cannot, in case of eviction, come against any one in possession of the lands, on which

otherwise her dower might have attached; this has nothing to do with the performance of covenants and the like. . . . My conclusion is, that the plaintiff has accepted in lieu of dower payment of money at least, and that she is also concluded by the acceptance of the bond, and although the bond was not satisfied, that she has no right to resort to the lands of her husband bought after and sold during the marriage." See also *Williams v. Chitty*, 3 Ves. 545; *Rose v. Reynolds*, 1 Swanst. 446, n; *Lacy v. Anderson*, Ib. 445, n.; *Vizard v. Longden*, 2 Eden, 66; *Birmingham v. Kirwan*, 2 S. & L. 444, 452; *Hamilton v. Jackson*, 2 J. & L. 295. But it seems that where the woman was a minor, any provision made at the time of her marriage, in order to bar her legal right to dower, must not be merely a precarious and uncertain provision which she may never enjoy. *Carruthers v. Carruthers*, 4 Bro. C. C. 499, 513; *Smith v. Smith*, 5 Ves. 188.

Although a provision in lieu of dower will not at law bar the wife against claiming freebench in copyholds, as they are not within the Statute of Uses, nevertheless it will operate as a bar in equity. *Walker v. Walker*, 1 Ves. 54; *Jordan v. Savage*, Bac. Abr. "Dower," G 5.

It seems that the use of the term "jointure," in articles before marriage, will be sufficient to show the intention of the parties to the articles, that the provision termed a jointure should be in bar of dower. *In re Dwyers, Minors*, 13 Ir. Ch. Rep. 431, 441.

The husband could always bar the wife's right to freebench by a surrender, as she was never entitled to her freebench unless her husband died seised of the copyholds (*Willis v. Willis*, 34 Beav. 340, 344); it could also be barred by an intention to that effect expressed in, or properly deducible by implication from, the settlement. Ib.

Where, however, in a marriage settlement, "in order to make some provision for" the intended wife in case she should survive, her husband settled some of the husband's copyholds after his death on her for life, it was held by Sir John Romilly, M.R., that she was not thereby barred of her freebench in other copyholds of which the husband died intestate. *Willis v. Willis*, 34 Beav. 340.

Where the husband makes a provision for the wife *subsequently* to marriage, she will not be bound thereby, although it be expressly in lieu of dower; but a Court of Equity will not allow her to take both provisions, and will compel her to elect between them. See Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. 395.

And even if a husband may not have expressly stated that a certain provision was in lieu of dower, nevertheless if it were inconsistent with the assignment of dower by metes and bounds, the Chancery Division will put the widow to her election. See 1 L. Cas. Eq. 394, 5th ed. See also the recent cases, *Parker v. Sowerby*, 4 De Gex, Mac. & Gord. 321 (overruling *Warbuton v. Warbuton*, 2 Sm. & Giff. 163); *Parker*

v. Sowerby, 1 Drew. 488; *Gibson v. Gibson*, Ib. 43; *Nottley v. Palmer*, 2 Ib. 93; *Pepper v. Dixon*, 17 Sim. 200.

As to the priority of a legacy given to a widow for relinquishment of dower, see 2 L. C. Eq. 286, 5th ed., and cases there cited.

With regard to women married since the 1st January, 1834, questions of election will less frequently arise, as dower may now be more readily barred by the husband under the Dower Act. See sects. 4, 5, 6, 7 and 8. And a devise of land by a man married after 3 & 4 Will. 4, c. 105, came into operation, will, in the absence of a contrary intention declared by the will, deprive her of dower. See sect. 9 of that act, which enacts, "That where a husband shall devise any land out of which his widow would be entitled to dower, if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will."

By the 10th section it is enacted, "that no gift or bequest made by any husband, to or for the benefit of his widow, of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall appear."

As to jointures made in execution of a power, see Sugd. Pow.

As to performance of a covenant to settle a jointure, see note to

Wilcocks v. Wilcocks, and *Blandy v. Widmore*, 2 L. Cas. Eq. 392, 5th edit.

The right of the widow to dower might, as we have before observed, be barred by several forms of conveyancing which prevented dower from attaching; but those generally adopted were the uses to bar dower, which have already been mentioned, ante, p. 74.

Formerly, where the right of dower had attached to lands, the wife, either by levying a fine alone (*Portington's Case*, 10 Co. Rep. 43), or joining with her husband in a fine or recovery, might have passed her interest in them (*Lampet's Case*, 10 Co. Rep. 49), unless she joined for a limited object merely, as a mortgage (Ib.; *Doe v. Coltman*, 1 Vern. 294; *Anon.*, 2 Eq. Ca. Abr. 385; *Jackson v. Parker*, Amb. 687), and it was immaterial whether the declaration of uses were executed before (*Beckwith's Case*, 2 Co. Rep. 57) or after (*Swanton v. Raven*, 3 Atk. 105; *Beckwith's Case*) the levying of the fine; provided the declaration was according to the intent with which the fine was levied. And now a woman married on or before the 1st January, 1834, may, by deed acknowledged according to the provisions of the Fines and Recoveries Abolition Act (3 & 4 Will. 4, c. 74, ss. 68—82), bar her right of dower.

With regard to any woman married *after* the 1st January, 1834, her right to dower is entirely at the mercy of her husband, since by the Dower Act (3 & 4 Will. 4, c. 105) she will be entitled to no dower out

of estates absolutely disposed of by him in his lifetime or by his will (s. 4), and priority will be given to partial interests created by any disposition or will of the husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject (s. 5); and the husband may bar dower by a declaration in a deed (which need not be executed by him, *Fairley v. Tuck*, 3 Jur., N. S. 1089,) (s. 6), or by his will (s. 7), in the latter of which instruments he may render it subject to any conditions, restrictions or directions (s. 9); but no gift or bequest of personal estate, or of land not liable to dower, will prejudice her right to dower, *unless* a contrary intention be declared by his will. Sect. 10.

However, a covenant or agreement on the part of the husband not to bar dower may be enforced in equity. Sect. 11.

Upon the construction of this act it has been decided that the dower of a woman married *after* 3 & 4 Will. 4, c. 105, came into operation, out of an estate made subject to dower by that act, will not be excluded by a declaration against dower contained in a conveyance prior to that act. *Fry v. Noble*, 20 Beav. 598; S. C., on appeal, 7 De G., Mac. & G. 687; *Clarke v. Franklin*, 4 K. & J. 266.

A widow's dower or freebench is not, by Sir John Romilly's Act (3 & 4 Will. 4, c. 104) nor by the Dower Act (3 & 4 Will. 4, c. 105), rendered liable to the mere debts of her husband. See *Spyer v. Hyatt*, 20 Beav. 621, where Sir John Romilly, M. R., observes that

"What is claimed by or comes to the widow is no part of what the intestate is seized of at his death. He dies seized of land *subject to the widow's right to dower*, and it is only that which becomes subject to the payment of his debts."

A widow, however, has no right, as against the heir at law of her deceased husband, to be indemnified against a mortgage created by him. Therefore, where in a case of that description, the mortgaged property had been sold by order of the Court in a suit for the administration of an intestate's estate, it was held by Sir W. Page Wood, V.-C., that as between his widow and his heir, the right of the widow to dower was limited to one-third of the income of the clear surplus of the proceeds of the sale, after deducting what was due upon the mortgage. *Jones v. Jones*, 4 K. & J. 361.

The better opinion appears to be that a husband may deprive his widow of dower by a mere general disposition of his land by will, under the 4th section of the Dower Act. See *Lacey v. Hill*, 19 L. R., Eq. 346, 349, overruling the dicta of Lord Romilly, M. R., in *Rowland v. Cuthbertson*, 8 L. R., Eq. 469, where his lordship was under the impression that the disposition of the husband by his will, in order to defeat the dower of his widow, "must point the land out specifically or designate it in some way."

It is clear, moreover, that to bar the widow's right to dower, under the 9th section of the act, a general disposition of his land by will, under which she takes a partial interest,

will, in the absence of a contrary intention, be sufficient (*Rowland v. Cuthbertson*, 8 L. R., Eq. 466; *Lacey v. Hill*, 19 L. R., Eq. 346), and a general devise by a husband of his real estate upon trust to sell, and give his widow a part, even in the shape of part of the capital, or of any income of the proceeds to be invested, is a gift of "an estate or interest" in the land for the benefit of the widow within the meaning of the 9th section. *Lacey v. Hill*, 19 L. R., Eq. 346, 350.

Moreover, independently of the Dower Act, a husband may by devise deprive his widow of freebench in copyholds, for under the old law, if a man surrendered his copyhold estate to the use of his will, and then devised it, the widow did not take freebench, the effect of the surrender being to destroy her title to freebench. Then 55 Geo. 3, c. 192, was passed, which enabled a man to devise copyholds without surrender, and under it the devise took effect as if the testator had surrendered, and therefore the widow did not take freebench. And now, under the 3rd section of the Wills Act (1 Vict. c. 26), the same effect is to be given to a gift of copyholds by will under the new law, as under the law as it stood before the Wills Act, and consequently the widow in such case is not entitled to freebench. *Lacey v. Hill*, 19 L. R., Eq. 346, 350, 351.

The attainer of the husband for treason, unless he died before judgment (Co. Litt. 390 b, 391), would have barred the right of his widow to dower (Ib. 41 a; 5 & 6 Edw. 6, c. 11, s. 13; 39 & 40 Geo. 3, c. 93),

both out of lands of which he was seised at the time of the attainder, and out of those which (even before the Dower Act) he had previously aliened, although he might obtain a pardon (*Maynye's Case*, 1 Leon. 3), unless the attainder were reversed by Parliament or for error (Co. Litt. 392; *Menvil's Case*, 13 Co. Rep. 19). Lands, however, acquired *after* pardon, would be subject to dower. Perk. s. 387.

Since the passing of 33 & 34 Vict. c. 23 (4th July, 1870), forfeitures for treason and felony have been abolished. Even previous to that act the attainder and conviction and outlawry of the husband, for murder or felony, would not cause a forfeiture of his widow's dower. 1 Edw. 6, c. 12, s. 17; 5 & 6 Edw. 6, c. 11, s. 13; Co. Litt. 392 b.

The wife formerly would *forfeit* her right to dower, if she were attainted for treason, murder or felony (Perk. s. 349), unless she obtained a pardon during her husband's lifetime, in which case her right would be renewed. Co. Litt. 33 a, n. 8; 13 Co. 23.

And although forfeiture for treason and felony is abolished by 33 & 34 Vict. c. 23, it seems that the interest of a widow as dowress might be vested in administrators for the purposes therein mentioned until she ceased to be under the operation of the act—by death, bankruptcy, completion of term of punishment, or pardon. Sects. 7, 9.

If the wife, in consequence of her misconduct, is divorced from her husband *à vinculo matrimonii*, and not merely *à mensâ et thoro*, or if she elope from her husband and

stay with the adulterer, even though she return to, and cohabit with, her husband in consequence of ecclesiastical censure, she will lose her dower; but she will become entitled to it if she be reconciled to him without ecclesiastical coercion (13 Edw. 1, c. 34; Co. Litt. 32 a, 32 b; see *Menvil's Case*, 13 Co. Rep. 23); and the forfeiture will take place although the adultery has been committed by the wife after a separation by mutual consent (*Hetherington v. Graham*, 6 Bing. 135); or even after her departure from her husband's house in consequence of his gross misconduct or cruelty. *Woodward v. Dowse*, 10 C. B. (N.S.) 722; *Bostock v. Smith*, 34 Beav. 57.

Although formerly there was neither at law nor in equity any limitation to a claim for arrears of dower (*Oliver v. Richardson*, 9 Ves. 222), by 3 & 4 Will. 4, c. 27, such arrears cannot be recovered or obtained for a longer period than six years next before the commencement of an action or suit. Sect. 41.

And an action at law for an assignment of dower, and a suit in equity for dower, would, under the same act, be barred if proceedings were not taken within twenty-one years (sects. 2 and 3; *Marshall v. Smith*, 5 Giff. 37), and since January 1, 1879, within twelve years after the right accrued. 37 & 38 Vict. c. 57, s. 1.

Assignment of and Remedies to recover Dower.

Although by the death of her husband the *title of dower* is consummate, the *title of entry* does not accrue until the ministerial act of

T.L.C.

assigning to her a third part in certainty has been performed by some other person. She has no seisin in law, nor can she exercise any act of ownership before assignment. Park, Dower, 247, 283.

As it is not certain of what part of the lands a widow will be endowed, she cannot enter upon them until they are assigned to her by metes and bounds, and this ought to be done within the quarantine or forty days that the law allows the widow to remain in her husband's house after his death; and as dower is of common right, it is not necessary that the assignment should be made by livery of seisin, or in writing (Co. Litt. 34 b, 35 a; *Booth v. Lambert*, Sty. 276; *Rowe v. Power*, 2 Bos. & Pull. N. C. 34); and it must be made by the owner of the freehold (Co. Litt. 34 b), even though an infant (1 Roll. Abr. 681, T. 1), or by one of several joint tenants (Co. Litt. 35 a; Perk. s. 397), even a disseisor (Co. Litt. 35 a; Perk. s. 394), unless he has obtained the freehold through collusion with the widow. Ib.

The widow cannot assign dower to herself, but if she have possession of the lands of which she is dowable as guardian in socage, she will be allowed the third part of the profits upon her account, in allowance of her dower in the meantime. Perk. s. 45; Co. Litt. 38 b, 39 a, b; Park, Dower, 336.

Writs of right of dower, writs of dower *unde nihil habet*, and plaints for freebench or dower, have been abolished, and there was substituted, for the old mode of procedure for dower, an action commenced by

G

writ of summons issuing out of the Court of Common Pleas, upon which was indorsed a notice that the plaintiff intended to declare in dower, or for freebench, as the case might be. 23 & 24 Vict. c. 126, s. 26. And the procedure now is under the Judicature Act, 1875 (38 & 39 Vict. c. 77).

After proceedings at law dower was assigned by metes and bounds by the sheriff. 2 Wms. Saund. 45a; 1 Taunt. 412.

An assignment of dower *of common right* will not be binding upon the widow if it be not absolute; if, for instance, there be an exception of trees growing on the land (*Bullock v. Finch*, 1 Roll. Abr. 682, X 8), or if the estate be not of equal duration to that of dower (*Bickley v. Bickley*, Anders. 287; *Colt v. Coventry*, Hob. 153); but a condition in favour of the widow will be good. *Wentworth v. Wentworth*, Cro. Eliz. 412.

If the land of which the widow is dowable is either improved or deteriorated by the acts of the heir, after the death of the husband, the widow will be entitled to dower according to the state of the land at the time of the assignment. Thus, it is laid down by Lord Coke, that "if the wife be entitled to have dower of three acres of marsh, every one of the value of twelve pence, and the heir by his industry and charge maketh it good meadow, every acre of the value of ten shillings, the wife shall have her dower according to the improved value, and not according to the value as it was in her husband's time, for her title is to the quantity of the land, viz., one just third part. And the like

law it is if the heir improve the value of the land by building; and on the other side, if the value be impaired in the time of the heir, she shall be endowed according to the value at the time of the assignment, and not according to the value as it was in the time of her husband." Co. Litt. 32 a.

In the case of the alienation of land by the husband, if it be improved by the alienees building thereon, the widow is entitled to have a third in value of all the lands, estimating the value as at the time of the assignment, and not merely at the time of the death of the husband. See *Doe d. Riddell v. Gwinnett*, 1 Q. B. 692. See also 1 Bright's Husb. & Wife, 385, 386.

Where timber is felled by order of the Court, *before* the assignment of dower, on an estate out of which a widow is dowable, she is entitled during her life to the interest arising from one-third of the fund produced by the sale of the severed timber. See *Bishop v. Bishop*, 10 L. J. (N. S.) Ch. 302. See also *Dickin v. Hamer*, 1 Drew. & Sm. 284.

Suppose the heir *before* the assignment of dower open *mines* on land of which the widow is dowable, is she dowable of those mines in the same manner as she would have been had they been opened in her husband's lifetime? Upon principle it seems she would be so entitled.

In *Dickin v. Hamer*, 1 Drew. & Sm. 284 (in which case, however, the point was not actually determined), Sir R. T. Kindersley, V.-C., was of opinion, "that the utmost a dowress under such circumstances could claim would be one-third of

the income of the proceeds arising from the royalties of mines opened by the heir, and not one-third of the corpus." *Ib.* 298.

A widow may, if she please, accept an assignment *not of common right*, as of an undivided third part of lands not distinguished by metes and bounds (*Rowe v. Power*, 2 Bos. & Pull. 1); or of so many acres of land (*Moore*, 59, pl. 167), or of rent issuing out of the land in lieu of dower (*Turney v. Sturges*, Dy. 91 b; *Bickley v. Bickley*, Anders. 287), and it will be a good assignment to all intents and purposes.

The assignment of lands, or of a rent arising from lands, out of which the widow is not dowerable, will not bar her right to dower if made only by parol. Co. Litt. 34 b; Perk. s. 410; *Vernon's Case*, 4 Co. Rep. 1; *Turney v. Sturges*, Dy. 91 b.

Where there is an excess in the assignment of dower, if it were the act of the heir, being of full age at the time, he has no remedy against the dowress for avoiding the consequences of that act (*Stoughton v. Leigh*, 1 Taunt. 412); if, however, he were under age at the time he may have relief by a writ of admeasurement of dower (Co. Litt. 39 a; *Stoughton v. Leigh*, 1 Taunt. 412); but not where the excess in value has arisen in consequence of improvements effected by the widow (*Fitz. N. B.* 149 c); but the discovery of mines formerly worked, which had been overlooked when the dower was assigned, would be a good ground for the writ. *Stoughton v. Leigh*, 1 Taunt. 412.

Under this writ of admeasurement the sheriff does not make a

new assignment, but only restores to the heir what was assigned to the widow over and above that to which she was legally entitled. *Fitz. N. B.* 148 F.

If the excessive assignment were made by the sheriff in execution of a judgment in dower, the heir might sue out a scire facias to obtain an assignment de novo (*Howard v. Candish*, Palm. 266; Bro. Abr. "Dower," p. 262, pl. 83; 1 Taunt. 412), or if the lands assigned were not in the judgment, the heir or tenant may proceed by ejectment. *Booth v. Lindsey*, Raym. 1293.

As to the jurisdiction the Court of Chancery had in such cases, see *Hoby v. Hoby*, 1 Vern. 218; *Sneyd v. Sneyd*, 1 Atk. 441.

If the widow be evicted from her dower lands, she will be entitled to an assignment de novo. Roll. Abr. 684, C 1; *Bustard's Case*, 4 Co. Rep. 122; Perk. ss. 418, 420.

Where the inheritance is divisible, as in the case of lands, a woman on becoming entitled to dower, although she cannot enter upon them, may claim to have one-third assigned to her in severalty by metes and bounds, or one-third of the rents. Where the inheritance is not in its nature divisible, dower is assigned to her in the most convenient manner; as, for instance, by the third toll dish of a mill, the third sheaf of tithes (previous to their commutation), the third part of the profits of stallage, of a fair, of an office, as that of marshal-sea, or of courts, fines and heriots, or by the third presentation of an advowson. Co. Litt. 32 a, 32 b.

As to the mode of assigning dower
G 2

of mines, see *Stoughton v. Leigh*, 1 Taunt. 410.

As to the assignment or setting out of dower, see 1 Bright, 362; Bell, Husb. & Wife, 279.

If the widow was compelled to resort to Courts of justice to enforce her right to dower, she might have proceeded either at law or in equity, and proceedings in the latter Court, as being by far the most convenient, were generally adopted. *Curtis v. Curtis*, 2 Bro. C. C. 620; *Mundy v. Mundy*, 2 Ves. jun. 128; 1 Bright, 398, 419; Bell, 306.

At common law the widow was entitled to dower only from the time it was assigned; the legislature, however, by the Statute of Merton, 20 Hen. 3, c. 1, and 16 & 17 Car. 2, c. 8, s. 4, gave her arrears of dower in the shape of damages (*Dobson v. Dobson*, Cas. t. Hardw. 19; *Watson v. Watson*, 10 C. B. 3); and in equity she might have had an account of the rents and profits (*Curtis v. Curtis*, 2 Bro. C. C. 620) from the death of her husband. The arrears, however, of dower can now be recovered for no longer period than six years before the commencement of an action or suit. 3 & 4 Will. 4, c. 27, s. 41.

Where land belonging to an infant, subject to his mother's right of dower, was taken by a railway company, and the purchase-money, as determined by two valuers, was paid into Court under the Lands Clauses Act (8 Vict. c. 18), it was held that the dowress was entitled to have the value of her right of dower, as determined by the valuers, paid to her out of the fund in Court. *In re Hall's Estate*, 9 L. R., Eq. 179.

As to the effect of the commutation or enfranchisement of copyholds on curtesy, dower or freebench, see 4 & 5 Vict. c. 35, s. 79, and 15 & 16 Vict. c. 51, s. 34.

Having examined the different kinds of estates for life, we may now proceed to show what is the power which tenants for life have over their estates, and the various incidents thereto.

As to Receipt of Rents or Profits by Tenant for Life.

A tenant for life of a settled estate is not only entitled to the ordinary rents thereof, but he takes all casual profits which accrue during the time of his tenancy for life. Thus, the tenant for life of a manor takes the fines arising from copyholds, because they become payable under an obligation arising from the custom. In some manors in the west of England copyholds are granted for lives, and fines paid on substitution of fresh lives. These fines are received by the tenant for life. *Brigstocke v. Brigstocke*, 8 Ch. D. 363.

In most cases fines are merely a mode of securing rent; and rents of two kinds,—an annual rent and a rent payable at more distant intervals. A certain sum payable at certain intervals is as much rent as if it were an annual sum. It is true that a fine is in the nature of a payment of rent beforehand, but a tenant for life is entitled to rent made payable beforehand as much as to any other rent. *Ib.*

Upon the same principle the tenant for life of an estate on which there are open mines receives the

royalties payable in respect of minerals gotten, though they are really instalments of the purchase-money of part of the inheritance. *Ib.*

Alienation and Forfeiture of Estates for Life.

A tenant for life has full power to alien the estate, and it cannot be made inalienable (*Brandon v. Robinson*, 18 Ves. 429), except in the case of property settled to the separate use of a married woman, and then only during her coverture, for upon her becoming discover, the restraint upon alienation is void. See *Tullett v. Armstrong*, 4 My. & Cr. 405; *Hulme v. Tenant*, 1 L. Cas. Eq. 521, 5th edit.

Except under a power or statute a tenant for life can create no interest which will endure beyond his own estate. Hence if he make a lease for a term of years it will end upon his death; but in such case a tenant at rack rent will, instead of his claim to emblements, continue to hold until the expiration of the then current year of his tenancy. 14 & 15 Vict. c. 25, s. 1.

It is however enacted by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), repealing and with some amendments re-enacting 19 & 20 Vict. c. 120; 21 & 22 Vict. c. 77; 27 & 28 Vict. c. 45; 37 & 38 Vict. c. 33; 39 & 40 Vict. c. 30, that in case of a settlement made after 1st November, 1856 (s. 57), any person entitled to the possession, or to the receipt of the rents and profits of any settled estates; for an estate for any life, or for a term of years determinable with any life or

lives, or for any greater estate, either in his own right or in right of his wife, may unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the curtesy, or in dower, or in right of a wife who is seised in fee, *without any application to the Court*, to demise the same or any part thereof, *except* the principal mansion-house, and the demesnes thereof, and other lands usually occupied therewith, from time to time, for any term not exceeding twenty-one years so far as relates to estates in England, and thirty-five years so far as relates to estates in Ireland, to take effect in possession, at or within one year next after the making thereof: *Provided* that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment of rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf; and provided a counterpart of every deed of lease be executed by the lessee. (Sect. 46.)

Moreover, the execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by the act. (Sect. 48.) As to the power of the court to authorize agricultural or occupation leases, mining leases, leases of water-mills, way-leaves, water-leaves, or other rights or easements, repairing leases and building leases, see *Ib.* sect. 4.

Tenants for life being bound, as observed in *Lewis Bowles's Case*, "to do fealty," even after the abolition of tenures, by 12 Car. 2, c. 24, their estates were forfeitable, for causes which had their origin in the existence of feuds.

Thus, as under the feudal system, the tenant by renouncing his tenure, as by claiming the reversion himself, acknowledging it to be in a stranger, or accepting it as a gift of a stranger, incurred a forfeiture of his interest, so a tenant for life, who conveyed the entire ownership of the estate, by means of conveyances, which formerly had a *tortious* operation, that is to say, conveyed the whole estate, and not merely the interest of the tenant for life therein, thereby incurred a forfeiture of his life interest. *Co. Litt.* 251, 252 a.

The conveyances which were formerly *tortious*, were a feoffment, recovery, or fine (unless there were proper words of restriction). However, fines and recoveries are now abolished, and the *tortious* operation of a feoffment (an instrument seldom used) is taken away (7 & 8 Vict. c. 76; 8 & 9 Vict. c. 106,

s. 4), and it is now a mere innocent conveyance, that is to say, it merely passes the interest of the feoffor.

Tenants for life may, however, sell and convey the fee of lands required by railway companies under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18, s. 7), and may, under the direction of the Chancery Division, convey the whole fee, where other parties cannot do so, either by way of sale or mortgage for payment of a testator's debts (11 Geo. 4 & 1 Will. 4, c. 47, s. 12; 2 & 3 Vict. c. 60; and see 13 & 14 Vict. c. 60, s. 29). And jurisdiction is given to the Chancery Division to order the sale of settled estates under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18, s. 16), repealing the act to facilitate Leases and Sales of Settled Estates, 19 & 20 Vict. c. 120, s. 11.

The legislature has also enabled tenants for life, by complying with certain regulations, to charge the inheritance with money laid out for *draining*, and some other permanent improvements, the principal being paid off by annual instalments. See 8 & 9 Vict. c. 56; 9 & 10 Vict. c. 101; amended by 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 13 & 14 Vict. c. 31; 19 & 20 Vict. c. 9; 27 & 28 Vict. c. 114.

The legislature has also recently enabled the owners of settled estates in England and Ireland to charge such estates, within certain limits, with the expense of building or enlarging mansions, or converting houses suitable to the estate into mansions, as residences for the owners of the estates. 33 & 34 Vict. c. 56, repealed in part by 34 & 35

Vict. c. 84, s. 2, and to be construed with 27 & 28 Vict. c. 114 (The Improvement of Land Act, 1864).

As to the mode in which the Court has jurisdiction to apply monies paid into Court under the Lands Clauses Consolidation Act (8 Vict. c. 13, s. 69), see Morgan and Chute's Chancery Statutes and Orders, pp. 34—36, 5th ed., and cases there cited; *In re Leigh's Estate*, 6 L. R., Ch. App. 887.

Except under the provisions of these or similar acts, a tenant for life will not have any allowance or compensation made to him for repairs or improvements effected upon the property; nor can they ordinarily be charged on the inheritance (*Caldecott v. Brown*, 2 Hare, 144; *Dixon v. Peacock*, 3 Drew. 288, 292; *Sharshaw v. Gibbs*, Kay, 333; *Hamer v. Tilsley*, Johns. 486; *Horlock v. Smith*, 17 Beav. 572; *Mathias v. Mathias*, 3 Sm. & G. 552, 556; and see *Dunne v. Dunne*, 3 Sm. & Giff. 22; 7 De G., Mac. & G. 207; *In re Leigh's Estate*, 6 L. R., Ch. App. 887; *Gilliland v. Crawford*, 4 I. R., Eq. 40); nor will such expenditure be authorized by the Court of Chancery upon the application of the tenant for life (*Nairn v. Majoribanks*, 3 Russ. 582; see vide *Macnulty v. Fitzherbert*, 27 L. J., Ch. 272; 3 Jur., N. S. 1237).

An exception, however, has been made where a tenant for life, under no obligation to do so, has completed a mansion house commenced by the settlor, for then there may be an inquiry whether anything and what has been properly expended, *i.e.* for the benefit of the inheritance.

See *Hibbert v. Cooke*, 1 S. & St. 552. There a tenant for life of real estates under a will having expended money in finishing a mansion house which the testator had begun, but left unfinished, and also in repairing the mansion house which had been damaged by dry rot, Sir J. Leach, V. C., in a suit for administering the trusts of the will, directed an inquiry whether it was for the benefit of all parties interested that the mansion house should be finished, but refused an inquiry as to the repairs, and said, if it was found for the benefit of all parties interested that the mansion house should have been finished, and there was no personal estate applicable, the expense should be a charge on the real estates. See also *Dent v. Dent*, 30 Beav. 363; *Frith v. Cameron*, 12 L. R., Eq. 169; but see *Joliffe v. Twyford*, 26 Beav. 227. So an inquiry has been directed as to the expenditure of a tenant for life in working a mine to prevent forfeiture at a time when it was unproductive. *Dent v. Dent*, 30 Beav. 363.

It has been said by Sir James Wigram, V. C., that "the case may be suggested of a devise of lands in strict settlement, and a direction to lay out personal estate to the same uses; it might be more beneficial to the remainderman that a part of the trust fund should be applied to prevent buildings on the settled estate from going to destruction, than that the whole should be laid out in the purchase of other lands." See *Caldecott v. Brown*, 2 Hare, 146. In *Bostock v. Blakeney*, 2 Bro. C. C. 556, Mr. Justice Buller, sitting for

the Lord Chancellor, directed, at the hearing of a cause, an inquiry what substantial and lasting improvements had been made by the tenant for life of the estate; but the decree was reheard by Lord Thurlow, and reversed on this point. In the case of *In re Barrington's Settlement*, 1 J. & H. 142, upon the authority of the dictum of Sir James Wigram, V. C., in *Caldecott v. Brown*, Sir W. Page Wood, V. C., seems to have authorized trustees of a settlement having a power of purchasing lands at the request of the tenant for life to lay out part of the fund in repairs and permanent improvements on some property which had been purchased under the power. The case, however, of *Dunne v. Dunne*, 3 Sm. & Giff. 22; 7 De G., Mac. & G. 207, does not appear to have been called to his Honor's attention, where the Lords Justices of the Court of Appeal refused to authorize money directed to be laid out in the purchase of land to be settled to the same uses as a mansion house, to be employed towards improving or repairing the mansion house, Lord Justice Knight Bruce observing, that "this must be done, if at all, by an act of parliament." And see *In re Rudyard's Trusts*, 2 Giff. 394, and cases collected, 1 L. C., Eq. 910, 5th edit.

Custody of Title Deeds by Tenant for Life.

As a general rule, a legal tenant for life is entitled as of right to the custody of title deeds relating to the estate (*Ford v. Peering*, 1 Ves. jun. 72; *Strode v. Blackburne*, 3 Ves.

225; *Bowles v. Stewart*, 1 S. & L. 209; *Allwood v. Heywood*, 1 H. & C. 745; *Garner v. Hannington*, 22 Beav. 627; *Foster v. Crabb*, 12 C. B. 136; *Leathes v. Leathes*, 5 Ch. D. 221); except in cases only where he has been guilty of misconduct so that the safety of the deeds has been endangered (per Jessel, M. R., in *Leathes v. Leathes*, 5 Ch. D. 222; and see *Stanford v. Roberts*, 6 L. R., Ch. App. 310), or where the rights of others intervene, and it becomes necessary for the Court to take charge of the title deeds, in order to carry out the administration of the property, per Sir G. Jessel, M. R., in *Leathes v. Leathes*, 5 Ch. D. 222; and see *Stanford v. Roberts*, 6 L. R., Ch. App. 307, where the Court refused to order deeds to be delivered up by trustees to the legal tenant for life, pending a suit actively prosecuted, where it was more convenient that the deeds should remain with the trustees; for in such case the custody of the deeds did not depend on the question who had the legal right to them, but on the question what custody was most convenient for the purposes of the suit. Ordinarily, if deeds have been given up to the Court of Chancery, they will be delivered up to the tenant for life (*Duncombe v. Mayer*, 8 Ves. 320), unless they had been brought in under an order for safe custody (*Webb v. Webb*, 1 Eden, 8; 1 Dick. 298).

The mere fact that the tenant for life is living in Australia does not deprive him of his right to have the custody of the title deeds (*Leathes v. Leathes*, 5 Ch. D. 224). In another case, Lord Justice Knight

Bruce, where the purposes of a suit had been satisfied, agreeing with Kindersley, V. C., dissentiente Turner, L. J., held that as the tenant for life had taken the deeds without any necessity on a former occasion out of the jurisdiction, they ought not to be given up to him. Ultimately, however, upon the suggestion of Turner, L. J., an order was made for the delivery of the deeds to the tenant for life, with the consent of the mortgagees, upon his giving security for their safe custody upon the estate, and for their production at all reasonable times, and for their return into Court if ordered. *Jenner v. Morris*, 1 L. R., Ch. App. 603.

In the case of *Warren v. Rudall*, 1 J. & H. 13, Wood, V. C., drew a distinction between the case where the relationship of father and son existed between the tenant for life and remainderman, and the case where they were strangers. "With respect," said his Honor, "to the title deeds, it is a settled doctrine that this Court never interferes as to the possession of deeds between a father tenant for life and a son entitled in remainder; but in the case of a stranger tenant for life the Court will interfere; and this is a particularly strong case, because the deeds are in Court, and I am asked to deliver them out. The reversioner has no connection with the tenant for life; the deeds must remain in Court." In commenting on this decision, Sir G. Jessel, M. R., says that "there is a dictum of Lord Hardwicke in *Pyncent v. Pyncent* (3 Atk. 571) to the same effect, but it is quite contrary to the law, for

the mere fact of the reversioner being a stranger to the tenant for life has nothing to do with the question." *Leathes v. Leathes*, 5 Ch. D. 223.

Where, however, deeds were brought into Court by the executor in a creditor's suit, the Court, on payment of the debts, would in that suit only deliver the deeds to the party who had deposited them, even although the tenant for life might by petition apply for their delivery out to himself. *Plunkett v. Lewis*, 6 Hare, 65.

If the tenant for life has parted with the deeds, and the remainderman is dissatisfied, he has been allowed to come into equity to have them secured (*Ford v. Peering*, 1 Ves. jun. 72; and see *Joy v. Joy*, 2 Eq. Ca. Abr. 284; *Ivie v. Ivie*, 1 Atk. 431; *Smith v. Cooke*, 3 Atk. 382; *Lord Lempster v. Lord Pomfret*, 1 Amb. 154); as they would be when a bill had been filed to have a remainder declared good, where it was in dispute (*Southby v. Stonehouse*, 2 Ves. 610; *Papillon v. Voice*, 2 P. Wms. 471). So also in the case of a jointress, provided the party seeking the deeds confirmed her in her jointure. *Senhouse v. Earl*, 2 Ves. 450; *Leach v. Trollope*, Ib. 662; *Petre v. Petre*, 3 Atk. 511.

A contingent remainderman would not, on a bill filed for that purpose, be allowed to obtain inspection of the title deeds in the hands of the tenant for life. *Noel v. Ward*, 1 Madd. 322.

Where, however, the absolute owner of property, who may do what he pleases with his deeds (1

Bro. Abr. 327 b, pl. 86; Co. Litt. 232 a; *Kelsaek v. Nicholson*, Cro. Eliz. 496), delivers them over to the remainderman, the tenant for life will not be able to recover them. 2 Bro. Abr. 84 b, pl. 25.

A person entitled to a vested remainder, or his assignee, might, if his title were clear, maintain a suit in equity against the tenant for life, for the sole purpose of the production and inspection of the title deeds and documents relating to the estate in possession of the tenant for life, in order to enable the remainderman or his assignee to deal with his property as he may consider most to his advantage (*Davis v. Earl of Dysart*, 20 Beav. 405). And if it were suggested that the purpose for which the documents were required was an improper one, the burden of proof would lie upon the person resisting the production. *Ib.*

Where, however, there was a reasonable cause of litigation, with respect to the interest of the plaintiff, the Court of Chancery would not order the production of the title deeds (*Ib.*); for if it were to do so the Court would incidentally decide in favour of the remainderman's title to the estate, in a suit merely for the production of the title deeds. *Pennell v. The Earl of Dysart*, 27 Beav. 542.

An equitable tenant for life is not entitled to the custody of deeds, as when the legal estate is vested in trustees upon trust to receive the rents and pay them over to the tenant for life. (*Garner v. Hannington*, 22 Beav. 630; but see *Lady Langdale v. Briggs*, 2 Jur., N. S. 982;

26 L. J., Ch. 27.) And it seems that a tenant for life would not be entitled to the deeds where a trustee has active duties to perform, although the trustee has not such an estate as would of itself entitle him to them, as for instance when he is a termor.

If the widow proceeds against the heir-at-law for dower, and he pleads that she detains the title deeds of the estate, unless she in her replication admits the possession of the deeds and offers to bring them into Court, she will lose mesne profits, damages and costs, since it was by her own fault, by improperly detaining the deeds, that dower was not assigned. Co. Litt. 32 b. And if she deny the fact of detaining any of the deeds, and the issue is found against her, she will lose her dower (*Hob. 199*); but an alienee (Cro. Eliz. 367; 9 Rep. 18), and it seems a devisee (*Dyer, 230 a.*), cannot plead the detention of the deeds as an excuse for not allowing dower to the widow, as this plea lies in privity only, viz. for the heir of the husband.

As to Renewals of Leaseholds where there is a Tenant for Life.

Where leaseholds are settled upon a person for life, and there is no direction upon the subject, it is optional with a tenant for life whether he will renew or not (*Nightingale v. Lawson*, 1 Bro. C. C. 443; *Stone v. Theed*, 2 Bro. C. C. 247; *White v. White*, 9 Ves. 554; *O'Ferrall v. O'Ferrall*, Rep. t. Plunk. 79); even, it seems, although the property may be in settlement

and vested in trustees. *Ib.*; *Lawrence v. Maggs*, 1 Eden, 453.

Where, however, there is an express direction to trustees or a tenant for life to renew, they must do so (*Montford v. Lord Cadogan*, 17 Ves. 485; *Bennett v. Colley*, 5 Sim. 181; 2 M. & K. 225); so likewise, where the direction is to be implied from the terms of the instrument creating the interest by the use of expressions which show that a renewal is contemplated. *Lock v. Lock*, 2 Vern. 666; *Hulkes v. Barrow*, Tambl. 264.

A mere direction that "it should be lawful for trustees from time to time as occasion should require, and as they should think proper, to apply for renewal," gives the trustees a discretionary, and not an arbitrary power to renew or not; and if there be a fair opportunity to renew, the trustees would be compelled to do so. *Lord Milsington v. Earl of Mulgrave*, 3 Madd. 491; 5 Madd. 471; see also *Mortimer v. Watts*, 14 Beav. 616.

A trustee who has neglected to renew, where there was an express trust to do so, will either be compelled to renew at his own expense for the benefit of the remainderman (*Lord Milsington v. Lord Mulgrave*, 3 Madd. 491; 5 Madd. 472), or, if the latter has himself obtained a renewal, to repay him the expense thereof (*Montford v. Cadogan*, 17 Ves. 485; 19 Ves. 635; 2 Mer. 3), but only the proper amount, if the terms of renewal were unreasonable (*Colegrave v. Manby*, 6 Madd. 72; 2 Russ. 238); the trustee, however, is entitled to be repaid

out of the personal estate of the tenant for life (2 Mer. 3; 19 Ves. 635), and if there have been successive tenants for life, their estates must contribute (2 Mer. 3); a purchaser, however, of the interest of a tenant for life will not be obliged to repay the trustee, unless he had, on the deed of assignment, express notice that the interest he thereby purchased was subject to the trust for renewal. 19 Ves. 641.

If a renewal is not effected at a proper time, the Court would impose a receiver upon the estate and sequester the rents and profits, so as to form a fund out of which, whenever an opportunity of renewal occurs, a renewal might be had (per Sir L. Shadwell, V. C., 5 Sim. 192); but the tenant for life might at any time have the whole of that fund transferred to him upon renewing at his own expense, or without expense, if he could procure a renewal without any. (*Ib.*)

Where, however, a renewal is impracticable, either on account of the absolute refusal to renew, or the refusal to do so save on exorbitant terms, such as the trustees may not be bound to accept (*Colegrave v. Manby*, 6 Madd. 82, 83), the general impression seems to have been that the tenant for life would not be allowed to retain that which the settlor never intended him to have: and that such sums, therefore, as would have been expended in effecting renewals, if practicable, at a reasonable rate, ought to be invested, and held upon the same trusts as the lease. *Colegrave v. Manby*, 6 Madd. 72, 87; 2 Russ.

238; *Bennett v. Colley*, 5 Sim. 181; 2 M. & K. 231; *Lewin on Trusts*, 392, 3rd edit.

It seems, however, to be now held that where it is impossible to obtain the renewal of a lease, if there be no predominant trust for renewal, overriding the disposition in favour of the subsequent tenant for life, the latter will be entitled to the sum accumulated by the direction of the settlor for that purpose. See *Morres v. Hodges*, 27 Beav. 625. There, by a settlement, the trustees were to use their utmost endeavours to renew an ecclesiastical lease upon reasonable terms, and to raise the fines out of the rents, or by mortgage. A renewal became impracticable. It was held by Sir John Romilly, M. R., with evident reluctance, upon the authority of *Tardiff v. Robinson*, 27 Beav. 629, n.—a decision of Lord Eldon's—that the fund reserved by the trustees out of the rents for the purpose of renewal belonged absolutely to the tenant for life. See also *In re Money's Trusts*, 2 D. & Sm. 94; *Richardson v. Moore*, 6 Madd. 83, n., cited.

Nor would the Court in such a case, where the trustees have a mere power to renew, allow them to purchase the reversion in leaseholds under the Episcopal and Capitular Estates Act (23 & 24 Vict. c. 124) to the prejudice of the tenant for life. *Hayward v. Pile*, 5 L. R., Ch. App. 214; *Jones v. Jones*, 5 Hare, 440, 461, 462.

Where, however, it appears to have been the paramount intention of the testator, as indicated by the

disposition made by his will, that those entitled in reversion expectant upon the decease of the tenant for life should succeed to the enjoyment of substantially the same estate, the tenant for life, upon the renewal becoming impracticable, will only be entitled to the income arising from the sum set apart for renewal, and of the sum produced by the sale of the leaseholds. *Maddy v. Hale*, 3 Ch. D. 327.

And where a similar intention is shown with regard to renewable leaseholds, which are afterwards taken by a railway company under its compulsory powers, a tenant for life will only be entitled to the interest arising from the purchase-money, although the custom to renew may not have ceased until after the premises were taken by the railway company. *In re Wood's Estate*, 10 L. R., Eq. 572.

Where a trust for renewal of leaseholds is absolute and overrules the interest of the tenant for life, he is not entitled to object, on the ground of the reduction of his interest, to any arrangement in lieu of renewal, which may be made under the provisions of the Episcopal and Capitular Estates Act (23 & 24 Vict. c. 124), where renewal ceases to be possible, so long as the best practicable terms are obtained. *Hollier v. Burne*, 16 L. R., Eq. 163.

Where it appears, upon examining the instrument by which leaseholds are settled, that no obligation to renew was intended, the tenant for life may suffer the lease to run out (*Harvey v. Harvey*, 5 Beav. 134); if, however, he chooses to

renew, he will be a trustee for all the persons interested under any subsequent limitations. *Rawe v. Chichester*, Amb. 715; *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Clegg v. Fishwick*, 1 Mac. & Gord. 294; *Isaac v. Wall*, 6 Ch. D. 706, and the note to *Keech v. Sandford*, 1 L. Cas., Eq. 50, 52, 56, 57, 5th edit., and cases there cited.

If the instrument by which the leaseholds have been settled imposes the obligation to renew, and points out the mode by which the expenses of the renewal are to be paid, that mode prescribes the obligations which are intended to be imposed upon the parties claiming under the instrument, and must be followed accordingly (*Hudleston v. Whelpdale*, 9 Hare, 784; *Solley v. Wood*, 29 Beav. 482). Thus where there is a direction to raise the fines out of the annual income, as by the investment of the overplus of the rents (*Stone v. Theed*, 2 Bro. C. C. 243), or a trust to renew out of "rents, issues and profits" (*Shaftesbury v. Duke of Marlborough*, 2 My. & K. 111, 121; *Trench v. St. George*, 1 Dr. & Wal. 417), the lease must be renewed out of the annual income alone; sed vide *Allan v. Backhouse*, 2 V. & B. 65; *Ivy v. Gilbert*, 2 P. Wms. 13, where some similar words were held to authorize a sale or mortgage.

Under a trust to renew leases "out of the rents, issues and profits," followed by a power, in case from any cause the money wanted to pay the fines should not be produced by the ways and means aforesaid, to mortgage, it has been held, that, the rents being sufficient

for that purpose, the fines ought to be paid out of income. *Solley v. Wood*, 29 Beav. 482.

A direction to renew, *by and out of the rents and profits or otherwise*, has been held to authorize a mortgage but not a sale, although the mortgagee might afterwards sell (*Garmstone v. Gaunt*, 9 Jur. 78); and where there was a direction to levy the fines *out of the rents and profits, or by mortgage, sale or other disposition* of the premises, it was held, that they were to be raised by sale or mortgage (*Playters v. Abbott*, 2 My. & K. 97, 110). Moreover, a fund for renewal may be provided out of other property. *Rickards v. Rickards*, 2 Y. & C. C. 419; *Wadley v. Wadley*, 2 Coll. 11.

Where the fines are to be provided out of the rents and profits, no difficulty arises in the case of leaseholds *for years*, when the period of renewal is certain, since the trustees may retain an annual sum out of the rents and profits from the tenant for life, so as to insure a due contribution on his part towards the expense of renewal (*Montford v. Cadogan*, 19 Ves. 633; *Earl of Shaftesbury v. Duke of Marlborough*, 2 My. & K. 121).

There is, however, some difficulty in the case of leaseholds *for lives*, the time of renewal being necessarily uncertain, and there are no means of ascertaining the proportion to be borne by the tenant for life until his death; the best mode seems to be that of insuring the lives of the cestui que vies for a sum sufficient to provide for a renewal on the dropping of any life. See *Earl of Shaftesbury v. Duke of*

Marlborough, 2 My. & K. 124; *Greenwood v. Evans*, 4 Beav. 44; *Mortimer v. Watts*, 14 Beav. 616, 624; and see *Browne v. Browne*, 2 Giff. 304.

Although, however, fines are made payable out of the annual rents, it may be a matter of necessity to raise them temporarily by a mortgage. Where, for instance, as observed by Sir John Leach, M. R., in the case of leases for lives, the renewal is to take effect immediately upon the death of the testator; the trustees must, in the first place, have recourse to a mortgage, since no rents can have accrued; and Lord Eldon observes, in *White v. White* (9 Ves. 554), that in such a case there seems to be no other mode of obtaining from the tenant for life his proportion of the expenses of renewal according to his enjoyment, than by compelling him to give security to that effect. If such security be not given, the remainderman could only resort to the uncertain assets of the tenant for life. *Earl of Shaftesbury v. Duke of Marlborough*, 2 My. & K. 121.

It seems if there were a direction that the fine should be raised by sale, without more, that the corpus of the estate ought to bear the expense of renewal, and that it was the intention that the entire estate should be settled, subject to the subordinate direction that it was to undergo a perpetual diminution with a view to its being otherwise preserved. *Jones v. Jones*, 5 Hare, 461.

Where there is a direction that the trustees shall raise the fine, either by sale or mortgage, or by

the application of rents and profits, or in any other mode which they shall think fit, there the effect as between the parties would be different, according to the mode which the trustees, exercising the power, might adopt. If they raised it out of the annual rents and profits, the manifest effect would be, to throw the charge upon the party in possession, preserving the entire estate. If, on the other hand, they raised it by a sale, then the estate would undergo a diminution of so many acres, the tenant for life losing the rent of the portion sold, and the remainderman losing it in perpetuity. *Jones v. Jones*, 5 Hare, 461, 464.

Where, however, the trustees not acting under the power, the Court of Chancery is called upon to exercise a discretion, the effect of which in one way would be to throw a burden upon one party, and if the discretion be exercised another way, to throw it upon a different party, and there is no reason for adopting one mode rather than the other, it seems that the Court would not throw the burden more upon one party than upon the other, but would apportion it between them. *Jones v. Jones*, 5 Hare, 462, 464, per Wigram, V. C.; see also *Allan v. Backhouse*, 2 V. & B. 65; *Greenwood v. Evans*, 4 Beav. 44.

When the instrument imposes the obligation to renew, and does not point out the mode in which the expenses of the renewal are to be paid, whether the leaseholds be for years or lives (*Jones v. Jones*, 5 Hare, 460; and see *White v. White*, 9 Ves. 554; *Allan v. Backhouse*,

2 V. & B. 65; *Greenwood v. Evans*, 4 Beav. 44), the ordinary way of raising the money in the first place for payment of the fines for renewal, is by a mortgage or sale of part of the estate (*Meynell v. Massey*, 2 Vern. 1; *Allan v. Backhouse*, 2 V. & B. 75; *Earl of Shaftesbury v. Duke of Marlborough*, 2 My. & K. 121; *Reeves v. Creswick*, 3 Y. & C. 715), and the parties themselves must ultimately bear the expense of renewal in proportion to the actual enjoyment they have had or may have of the lease, and not an extent of enjoyment to be determined by mere speculation, or by a calculation of probabilities. *Jones v. Jones*, 5 Hare, 440, 465; *Hudleston v. Whelpdale*, 9 Hare, 775, 786; *Ainslie v. Harcourt*, 28 Beav. 313, 319.

By a recent statute it has been enacted, that "it shall be lawful for any trustees of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, if they shall in their discretion think fit, and it shall be the duty of such trustees, if thereunto required by any person having any beneficial interest, present or future or contingent in such leaseholds, to use their best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustees from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf;" but this section is

not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same. 23 & 24 Vict. c. 145, s. 8.

Where the sum necessary for effecting a renewal has been raised by a mortgage of the estate, the tenant for life will be bound not only to keep down the interest of the mortgage, but to contribute towards paying off the mortgage, in proportion to the actual benefits which he may derive from the renewal; see *White v. White*, 9 Ves. 554; and *Hudleston v. Whelpdale*, 9 Hare, 775, 785, where the sum applied in effecting the renewal was provided out of funds in court, part of the corpus of the estate of the testator by whose will the lease was put into settlement.

If the tenant for life is willing to take upon himself to renew, there is very little difficulty in carrying out the transaction; he will enjoy the estate during his own life, and when the actual period of his enjoyment is ascertained, his estate will have a lien upon the residue of the term for any overpayment which may have been made (*Jones v. Jones*, 5 Hare, 465; *Harris v. Harris*, 32 Beav. 333); but it may be lost if the claim be not made in due time (*Ainslie v. Harcourt*, 28 Beav. 313). As to the mode of calculating the sum payable to the tenant for life, see *Bradford v. Brownjohn*, 3 L. R., Ch. App. 711.

The case is one of much greater difficulty where the renewal is made

by or at the expense of the remainderman, or (which as to this difficulty is the same thing) where the trustee is to raise the money and charge it on the corpus. In that case the tenant for life must give security for the benefit which he may derive from the renewal, for the purpose of bringing back to the capital so much as the tenant for life has had the benefit of, leaving the rest to be borne by the parties who may succeed him. *Jones v. Jones*, 5 Hare, 465; *Hudleston v. Whelpdale*, 9 Hare, 786, 787.

With regard to the amount of security to be given by the tenant for life, see *Jones v. Jones*, 5 Hare, 466. See also *Greenwood v. Evans*, 4 Beav. 44; *Reeves v. Creswick*, 3 Y. & Coll. 715.

Where there is a trust to renew leaseholds by sale or mortgage of another estate, the fines must be raised by sale or mortgage of that estate, and the successive tenants for life are only bound to keep down the interest on the mortgage. *Ainslie v. Harcourt*, 28 Beav. 313.

The rules relative to copyholds for lives given to persons in succession, are similar to those relating to the renewal of leaseholds for lives. See *Playters v. Abbott*, 2 My. & K. 97.

Where new trustees are admitted to copyholds, the fines, fees and expenses of the admission must be borne by the tenant for life and those in remainder, in proportion to their respective interests. *Carter v. Sebright*, 26 Beav. 374.

With respect to the anticipation as to future renewals, the theory appears to be, upon each renewal to

look at the property as about to be purchased for the benefit of the settlement, and then to consider in what way the fine for renewal is to be borne by the parties who are to enjoy the lease when renewed. *Jones v. Jones*, 5 Hare, 463.

Where a trustee misappropriates the rents of leaseholds which it was his duty to apply in renewals, the loss will fall on the tenant for life and not on those in remainder. *Solley v. Wood*, 29 Beav. 482.

As to whether, under a residuary bequest, a tenant for life will be entitled to enjoy leaseholds or other property of a perishable or wasting nature in specie, or whether they must be converted into property of a permanent character, so as to give those taking in remainder an equal chance of enjoyment, see *Howe v. Earl of Dartmouth*, 2 L. Cas. Eq. 296, 5th edit., and note.

When leaseholds are taken by a public company, and the purchase-money is paid into Court, the tenant for life is entitled to the same benefit thereout as he would have had from the lease (8 & 9 Vict. c. 18, s. 74); and as leasehold property is of a wearing-out character, it is evident that the mere interest of the purchase-money cannot be considered an adequate compensation to the tenant for life, and that some of the capital will necessarily be required for that purpose. The Court will arrive at the amount of capital to be paid to the tenant for life yearly, in addition to the dividends, by dividing the capital into parts according to the number of years which the lease has to run, and allotting to the tenant for life during his life one

of such parts of the capital, together with the dividends of the whole thereof; and the rest will be paid to the remainderman (*In re Money's Trust*, 2 Dr. & Sm. 94; *In re Pfleger*, 6 L. R., Eq. 426; *Littlewood v. Pattison*, 10 Jur., N. S. 873); or the Court may refer it to an actuary to ascertain what ought to be paid every year to the tenant for life out of capital and revenue (*In re Chamberlain*, Morgan's Chancery Acts, 43, n., 5th edit.; *In re Phillips' Trusts*, 6 L. R., Eq. 250). The case of *In re Birch*, 10 Jur. 673, in which Sir W. Page Wood, V. C., refused to give a tenant for life of leaseholds taken by a railway company the full amount of the income of the leaseholds, appears to be wrongly decided. And if the tenant for life has received too small a sum during his life, his representatives will be entitled to such further amount as ought to have been paid to him. Thus, in *Jeffreys v. Conner*, 28 Beav. 328, leaseholds bequeathed to one for life, with remainder over, were taken by a railway company, and the purchase-money was invested in consols. The tenant for life only received the dividends. It was held by Sir John Romilly, M.R., on her death (her representatives assenting to take it), that her estate was entitled, out of the consols, to the difference between the dividends received and the aggregate amount of the rental which would have accrued during her life, if the leaseholds had not been taken.

Where the tenant for life in such cases outlives the term for which he is entitled as tenant for life, he

will become absolutely entitled to the whole fund. *In re Beaufoy's Estate*, 1 Sm. & Giff. 20; and see *Phillips v. Sargent*, 7 Hare, 33.

Where land let on lease has been compulsorily taken under the Lands Clauses Consolidation Act, the tenant for life will only be entitled to receive annually, until the expiration of the term, out of the money paid into Court, a sum equivalent to the yearly rent reserved by the lease, and the rest of the income during that term must be accumulated and invested. At the end of the term the tenant for life will be entitled to the income arising from the accumulation as well as from the original purchase-money; for there is no reason why the tenant for life should receive more income than he did before the land was taken, and it is clear that, unless there were an accumulation of some portion of the income, there would not, at the determination of the lease, be in Court such a sum as would represent the value of the whole fee. *In re Wootton's Estate*, 1 L. R., Eq. 589; *In re Mette's Estate*, 7 L. R., Eq. 72. But see *In re Steward's Estate*, 1 Drew. 636.

As to Payment of Interest on Incumbrances or Principal by Tenant for Life.

As a general rule, a tenant for life, whether conventional or by operation of law, is bound, and may be compelled by the remainderman (*Makings v. Makings*, 1 De G., F. & J. 358), as far as the rents will extend, to keep down the interest of a mortgage (*Hungerford v. Hun-*

H

T.L.C.

gerford, Gilb. Eq. Rep. 69; 5 Ves. 106; *Faulkner v. Daniel*, 3 Hare, 206; *Simpson v. O'Sullivan*, 7 C. & F. 550), or of any ascertained charge (*Marshall v. Crowther*, 2 Ch. D. 199), on real estate during the time he is in possession, a dower of course being liable only to one-third (*Squire v. Compton*, 2 Eq. Ca. Abr. 387), and the assets of a tenant for life will be liable to his arrears (*Baldwin v. Baldwin*, 4 Ir. Ch. Rep. 501; 6 Ir. Ch. Rep. 156). And this liability of the estate of a deceased tenant is not affected by sect. 49 of the Landlord and Tenant Law Amendment (Ireland) Act, 1860 (23 & 24 Vict. c. 154), or by sect. 4 of the Apportionment Act, 1870 (33 & 34 Vict. c. 35). See *In re Gore* (a minor), 9 Ir. R., Eq. 83.

It is laid down by Lord Westbury, L. C., that "A tenant for life has all his lifetime to pay off the arrears of the interest, and he cannot be charged with neglect of duty, neither does any right arise to the remainderman until the death or insolvency of the tenant for life." See *Scholefield v. Lockwood*, 4 De G. Jo. & Sm. 31. This dictum, however, stands by itself, and is contrary to the current of authorities.

And the executor of a deceased tenant for life may be compelled by the remainderman to apply the arrears of rent and the apportioned part due to the tenant for life in payment of the interest due on charges upon the inheritance. *In re Fitzgerald's Estate*, 1 Ir. R., Eq. 453.

Where the legal estate is vested in trustees, a tenant for life can only enter into possession on the terms of keeping down the interest of in-

cumbrances. For if the trustees remain in possession, and the income is not sufficient to pay the interest, they may charge it on the corpus. But if they let the tenant for life into possession, they can only do so on the undertaking of the tenant for life to keep down the interest. See *Dixon v. Peacock*, 3 Drew. 288, 292—There trustees allowed a tenant for life to enter into possession, who paid the interest of incumbrances and expended money in improvements. The trustees did not call for any account of the rents, and the evidence, both as to the income being insufficient to keep down the incumbrances, and as to the improved value of the estate, was unsatisfactory. The tenant for life purchased the property, and the trustees allowed her to deduct from the purchase-money the money expended in paying interest and in improvements. It was held by Sir R. T. Kindersley, V. C., that she ought not to have been allowed those sums.

Although an adult tenant in tail in possession is not bound to keep down the interest on a mortgage, because the remainderman is said to be "at his mercy" (*Kennedy v. Daly*, 7 Ir. Ch. Rep. 445); an infant tenant in tail is bound to do so. *Sangeson v. Cruise*, 1 Ves. 477, 480, cited; *Sangeson v. Sealy*, 2 Atk. 412; T. & R. 176; 1 Bligh, 499; *Burgess v. Mawbey*, T. & R. 177. See 2 Fish. Mortg. 973, 3rd ed.

It has been held, however, that a tenant for life, with an absolute power of appointment, is bound to keep down the interest on

charges created by himself. *Whitbread v. Smith*, 3 De Gex, Mac. & Gord. 741.

The law is the same when the charge is made upon the property by will, and even in the case of debts by simple contract charged upon the estate. *Wastell v. Leslie*, 13 L. J., N. S., Ch. 205.

In the case of a redeemable annuity charged upon an estate, the tenant for life will only be bound to keep down the interest of the estimated value of the annuity. *Bulwer v. Astley*, 1 Phil. 422.

A tenant for life, moreover, will be obliged out of the whole of his income, when increased, to pay off the arrears which accrued due during his own life in consequence of the income having been too small formerly to enable him to keep them down. Thus where the interest of a charge fell into arrear in consequence of the existence of a jointure prior to the charge, it was held that upon the death of the jointress the tenant for life was bound to pay the arrears which had accrued due out of the increased surplus income. See *Revel v. Watkinson*, 1 Ves. 93, 94; *Tracy v. Lady Hereford*, 2 Bro. 128.

The mere laches of a mortgagee in not demanding interest from a tenant for life is no bar to his claim for arrears against the estate or remainderman, there being nothing to show connivance or collusion between the tenant for life and mortgagee (*Loftus v. Swift*, 2 Sch. & Lef. 642, 655; *Wrixon v. Vize*, 2 Dru. & War. 192); but when arrears are raised out of the estate, the remainderman is entitled to be

recouped out of the future income (*Makings v. Makings*, 1 De G., F. & J. 355; see also *Hawkins v. Hawkins*, 6 L. J. Rep., N. S. (Ch.) 69), or assets (*Kirwan v. Kennedy*, 3 Ir. R., Eq. 472) of the tenant for life the full amount of the arrears of interest raised out of the estate, in priority both to the assignees in bankruptcy or insolvency (*Waring v. Coventry*, 2 My. & K. 406; *Coote v. O'Reilly*, 1 Jo. & Lat. 455; 7 Ir. Eq. Rep. 356), or judgment creditors (*Kilworth v. Mountcashell*, 12 Ir. Ch. Rep. 43) of the tenant for life.

The claim of the remainderman to be recouped in such a case came within the 40th section of the Statute of Limitations (3 & 4 Will. 4, c. 27), and will be barred by the lapse of twenty years after a present right to receive the money has accrued to a person capable of giving a discharge for it (*Kirwan v. Kennedy*, 3 I. R., Eq. 472); but by 37 & 38 Vict. c. 57, after 1st January, 1879, the claim will be barred by the lapse of twelve years. Sects. 8, 9.

Nor does the statute run as against a right to be recouped out of a fund in Court, which is there in usum jus habentium. See *Howlin v. Sheppard*, 6 Ir. R., Eq. 38. There H., a remainderman, paid with his own money, after he came into possession, interest which had accrued due during the preceding estate for life, upon charges affecting the inheritance. It was held by Chatterton, Vice-Chancellor of Ireland, first, that his executor was entitled in 1870 (as against the personal representative of the tenant for life) to be recouped out of a

fund in Court, the produce of the rents of the life estate brought in in 1815 by a receiver appointed in an incumbrancer's suit instituted against the tenant for life; *secondly*, that the fund having remained in Court during the whole period from 1815 to 1870 in usum jus habentium, the claim of H.'s executor was not barred by the Statute of Limitations.

Where a mortgagee, having permitted a tenant for life to run into arrears for interest, purchased the life estate, and took possession under the purchase; it was held by Lord Alvanley, M. R., that he was bound to apply the surplus rents and profits beyond the current interest in discharge of the arrears, and that he could not charge any part of them against the inheritance. *Lord Penrhyn v. Hughes*, 5 Ves. 99. In commenting upon this case Sir W. Page Wood, V. C., has well observed, that there were two answers to the claim of the mortgagee to throw the arrears upon the inheritance, "one that he came in under a person whose duty it was to keep down the interest, and against whom a bill could have been filed by the reversioner to compel him to keep it down; and the mortgagee claiming under him could not be in a better position, and could not charge upon the reversion the interest which the tenant for life could not so have charged. Another answer might have been, that the mortgagee was trying to turn interest into principal, which the Court of Chancery never allows." Kay, 338.

And where a tenant for life has

permitted arrears of charges to accumulate, it has been held that the claim of a remainderman for compensation out of the life estate, for the increased burden thus cast on the inheritance, has priority over charges on the life estate created by the tenant for life, and secured by a demise of a legal term, without notice of the facts constituting the remainderman's equity (*Fitzmaurice v. Murphy*, 8 Ir. Ch. Rep. 363). But see dictum of Lord Romilly, M. R., *Lord Kensington v. Bouverie*, 19 Beav. 54. And arrears of interest permitted by the tenant for life to accrue due upon charges affecting the inheritance may, upon his decease, be set off against charges affecting the inheritance which, at the time of his decease, were vested in him. *In re Whyte*, 7 Ir. Ch. Rep. 61, n.

Where a tenant for life of an estate subject to a charge bearing interest pays the interest, although the rents and profits are insufficient for that purpose, he cannot make himself an incumbrancer on the estate for this excess in his payments, if he has not given to the remaindermen any intimation of the insufficiency of the rents and profits, and of his intention to charge the excess of his payments on the inheritance. Under such circumstances there is a presumption of the sufficiency of the rents and profits, and the personal representatives of the tenant for life cannot be allowed to rebut that presumption. *Kensington v. Bouverie*, 7 H. L. Cas. 557, reversing the decision of the Lords Justices (7 De Gex, Mac. & G. 134), and affirming the deci-

sion of Sir J. Romilly, M. R. (19 Beav. 39).

If the tenant for life under such circumstances is himself the person entitled to the benefit of the charge, and has mortgaged it, and his mortgagees have regularly been paid the interest on the mortgage debt, they are in no better situation than the personal representatives (*Ib.*). In *Shore v. Shore*, 4 Drew. 501, under the will of his father, who died in 1836, Offley Shore was residuary legatee and executor, and tenant for life of the testator's real estate, with remainder to his son, the testator's grandson. The testator at his death was largely indebted, and his personal estate was outstanding, owing, as to the greater part, to his having advanced large sums of money to a bank, of which his son Offley Shore was a partner. Offley Shore did not pay the debts or get in the chief portion of the personal estate, namely, the debts due from the bankers. The debts remained unpaid, carrying interest, but Offley Shore kept down the interest on the debts out of the rents of the real estate. In January, 1843, the firm of bankers of which Offley Shore was one of the partners became bankrupt. Ultimately enough personality was received to pay a large portion of the testator's debts, and was so applied, and then the real estate was sold. It was held by Sir R. T. Kindersley, V. C., that no portion of the money representing the corpus of the real estate could be applied in recouping the tenant for life the interest he had paid.

Where an estate is given to a person for life, with remainder over,

and the rents of the estate up to the death of the tenant for life are insufficient to pay an annuity made chargeable on the estate, it will be a question of intention whether the arrears of the annuity are to be thrown upon the corpus of the estate or not. See *Foster v. Smith*, 1 Phil. 629; *Miller v. Huddleston*, 3 Mac. & Gord. 513; *Playfair v. Cooper*, 1 W. R. 216.

But where a testator's debts are charged upon his real estate, as between the tenant for life and remainderman, the interest on the debts must be borne by the income as from the time of the testator's death. *Barnes v. Bond*, 32 Beav. 653.

The general right of parties entitled to real estate, given to one for life, with remainder over, if the interest exhausts the rents, is, that all or any of the parties interested have a right to have the estate discharged by sale of the real estate. See *Cooke v. Cholmondeley*, 4 Drew. 244. There a testator devised real estates, upon trust during the lives of his wife and two daughters, out of the rents, to pay his debts (other than debts charged on the real estate by way of mortgage) and his legacies, to keep up the mansion-house and to pay an annuity to his daughters, and, subject thereto, to pay the rents to his wife and daughters. There were mortgages which exhausted the rents. It was held by Sir R. T. Kindersley, V. C., that one of the daughters and the wife might have part of the estates sold to pay off the mortgages.

The obligation of a tenant for life of an estate subject to incum-

branches to keep down interest on the incumbrances, exists only as between him and the remainderman, and not as between him and the incumbrancers. See *In re Morley*, 8 L. R., Eq. 594. There a testator devised real estate to trustees for a term of 500 years upon trust to raise a sum of 9,000*l.*, with interest, for his younger children, and subject thereto, to his son F., for life, with remainders over. One moiety of the charge of 9,000*l.* became vested in the testator's daughter, M. No part of the charge was ever raised, and F., who had been let into possession, failed to keep down the interest. M. died in the lifetime of F., having by her will left him a legacy to be paid out of her moiety of the 9,000*l.* It was held by Sir R. Malins, V. C., that the legacy could not be retained by the executors of M. in satisfaction of the arrears of interest due to her.

And it seems that where a tenant for life has, by paying off a charge affecting the inheritance, obtained for himself an equivalent charge upon it, in the event of the tenant for life dying leaving arrears of interest unpaid, his representatives may set off the charge so paid against the claim of the remainderman for arrears of interest, *Howlin v. Sheppard*, 6 I. R., Eq. 497.

As to Arrears of Interest of a previous Tenant for Life.

A tenant for life is not liable, as between himself and the remainderman or reversioner in fee, unless he contract to do so (*Kilworth v. Mountcashell*, 12 Ir. Ch. Rep. 43, 55), to pay out of the rents and

profits of the estate arrears of interest on a mortgage which accrued due during the life of a preceding tenant for life who died insolvent; but such arrears are primarily a charge upon the inheritance (see *Sharshaw v. Gibbs*, 1 Kay, 333; *Caulfield v. Maguire*, 2 J. & L. 141, 158, censuring the dicta of Lord Alvanley, M. R., in *Penrhyn v. Hughes*, 2 Bro. C. C. 128; *Kirwan v. Kennedy*, 4 I. R., Eq. 499): the reason being, that, as both the tenant for life and remainderman or reversioner have it equally in their power to compel the previous tenant for life, when in possession, to keep down the interest (*Hayes v. Hayes*, 1 Ch. Cas. 223), it is not just that the consequence of the neglect to do so should be thrown exclusively on the tenant for life. See also *Kennedy v. Daly*, 7 Ir. Ch. Rep. 445.

Where there are successive life estates, if a subsequent tenant for life is compelled to pay arrears of interest upon a charge affecting the inheritance which had accrued due during a prior life estate, he is entitled to the repayment of that sum out of the inheritance. *Kirwan v. Kennedy*, 4 I. R., Eq. 499.

Where, however, the inheritance of the wife is subject to a mortgage, she and her husband are not bound during her life to keep down the interest for the benefit of her heir; the arrears, therefore, upon her death, would have to be added to the principal, and the husband, as tenant by the curtesy, would be bound during his life to keep down the interest on the aggregate amount, but he is not entitled to an allowance for any interest actually

paid during the life of his wife. *Ruscombe v. Hare*, 2 Bligh, N. S. 192.

Where a mortgaged estate is sold, the tenant for life will be entitled to the interest of the surplus. *Tracy v. Lady Hereford*, 2 Bro. C. C. 137.

A tenant for life, however, whether conventional or by operation of law, may redeem the estate, and in that case he has a lien upon it for such part of the charge as the remainderman ought to have contributed; if, however, the tenant for life refuse to redeem, the remainderman may, by redeeming the mortgage, and ejecting the tenant for life, and taking possession of the profits, or by filing a bill of foreclosure, compel him to come in and contribute, or give up the possession of the estate (*Coote's Mortg.* 527; *Jones v. Griffith*, 2 Coll. 207; and see 3 Anst. 757). And the contribution between the parties, as in the analogous case of contributions for fines upon the renewal of leaseholds, will be in proportion to the respective interests of the parties. *White v. White*, 9 Ves. 554.

As to the apportionment of rents between the representatives of tenant for life and remainderman, see *Clun's Case*, and note, post.

Emblements, Right of Tenant for Life to.

Where persons having limited interests, as, for instance, for a man's own life (Br. "Emblements," pl. 6; 7 H. 4, 17), pour autre vie (Co. Litt. 55 b), as tenant by the curtesy (2 Bl. Comm.

122), or dowress (Statute of Merton, 20 Hen. 3, c. 2); or as parson (28 Hen. 8, c. 11); *having sown* their lands with such seeds as produce *annual profits*, their estates determine by act of God, or of another, before harvest, they, or their representatives, will be entitled to emblements, or, in other words, to the crops of what they have sown, bearing an annual profit, such as corn, hemp and flax, with liberty to enter upon the land and carry them away (Co. Litt. 55 a), though not of such things as they may have planted, not bearing an annual profit, such as young fruit-trees, oaks, ashes, elms, nor of the produce of acorns which they may have sown (Co. Litt. 55 b).

Hops, it seems, although growing out of the old roots, will go to the executor or administrator of the tenant for life, because it is said "they grow by the manurance and industry of the owner, and so are like emblements" (Vin. Abr. "Emblements," pl. 77; *Latham v. Atwood* Cro. Car. 515, pl. 13). In *Graves v. Weld*, 5 Barn. & Ad. 105, a tenant, for a term determinable upon a life, sowed the land in spring, first with barley and soon after with clover; the life expired in the following summer. In the autumn the tenant mowed the barley, together with a little of the clover plant which had sprung up. The clover so taken made the barley straw more valuable by being mixed with it; but the increase of the value did not compensate for the expense of cultivating the clover, and a farmer would not be repaid such expense in the autumn of the year

in which it was sown. The reversioner came into possession in the winter, and took two crops of the same clover after more than a year had elapsed from the sowing. It was held by the Court of Queen's Bench that the tenant was not entitled to emblements of either of these two crops: first, because emblements can be claimed only in a crop of a species which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed; and secondly, because even if the plaintiff were entitled to one crop of the vegetable growing at the time of the cesser of his interest, this had been already taken by him at the time of cutting the barley. See also *Flanagan v. Seaver*, 9 Ir. Ch. Rep. 230.

Where, however, the estate is determined by the act of the tenant for life, as by surrender (Com. Dig. Biens, G), by forfeiture for breach of a condition or otherwise (Co. Litt. 55 b), or by marriage of a woman who holds *durante viduitate sua* (*Oland's Case*, 5 Co. 116 a; Co. Litt. 55 b), the tenant for life will not be entitled to emblements. So likewise a parson who resigns his living is not entitled to emblements from the glebe (*Bulwer v. Bulwer*, 2 Barn. & Ald. 470). But it seems if the land of the tenant for life, whose estate was determined by his own act, had been in the occupation of a lessee, that the tenant shall nevertheless have emblements, inasmuch as it would be unjust that he should be prejudiced by the act of his lessor (see *Oland v. Burdwick*, Cro. Eliz. 460; *S. C.* nom. *Oland*

v. Burdwick, Gouldsb. 189; *Bulwer v. Bulwer*, 2 B. & A. 470. Sed vide *Oland's Case*, 5 Co. 116 a). Now, however, by 14 & 15 Vict. c. 25, s. 1, the tenant, if at rack rent, will be entitled to hold to the end of the current year of the tenancy in lieu of emblements, to which he will be no longer entitled.

But a person who has not a claim to emblements cannot claim the benefit of the extended term. Hence it has been held that a tenant *pour autre vie*, who had underlet the land, could not claim to hold under 14 & 15 Vict. c. 25, after the death of the *cestui que vie*, his under-tenants having relinquished all claims to emblements. *Lord Stradbroke v. Mulcahy*, 2 Ir. Com. L. Rep. (N. S.) 406.

A tenant *pour autre vie* will not, it seems, by the mere act of overholding, forfeit his right to emblements of crops sown by him before the termination of his lease, upon the death of the *cestui que vie* (*Kelly v. Webber*, 11 Ir. C. L. Rep. (N. S.) 57, 61); but the landlord, upon recovering in ejectment, will be entitled to crops sown after the termination of the tenancy. *Ib.*

A tenant for life will not be entitled to emblements even if the estate be determined by act of God, if the land have been sown by another person. Thus if a woman seised in fee or for life of land, *sows it*, and afterwards takes a husband, who dies before severance, it seems the wife shall have the crop, and not the executor or administrator of the husband, because he did not sow the land (Vin. Abr. "Emblements," pl. 17). So if A. seised in fee of

land sows it with grain, and afterwards grants it to B. for life, with remainder to C., and B. dies before severance, C. shall have the corn, and not the executors of B., for the reason that industry and charge on the part of B. are wanting. *Ib.* 21; *Hobart's Rep.* 178, per Curiam; and see Br. "Emblements," pl. 26.

If emblements be not disposed of either by will or otherwise they will go to the executors or administrators of the tenant for life. If they are purchased by a landlord from his former tenant they will pass by a demise of the lands simply without exceptions to a new tenant. *Copley v. Enright*, 8 Ir. Com. L. Rep. (N. S.) 393.

The rule by which emblements are given to the representatives of the tenant for life is, it is said, founded on a consideration of public benefit, for the encouragement of husbandry and the increase and plenty of provisions. *Co. Litt.* 55 b; 1 Roll. Abr. 726.

Fixtures, Right of Tenant for Life to.

The law upon this subject depends upon grounds analogous to that of emblements, viz., that it is for the public good that a person having a limited interest as tenant for life, who erects a fixture for the better use or enjoyment of land, should not be deprived of it by the claim of the remainderman or reversioner, on the ground of its annexation to the freehold. Formerly it was a general rule of law, that whatever was fixed to the freehold became part of it, and could not be taken from it (*Co. Litt.* 53 a); this

rule, however, has been justly relaxed; for instance, it has been held, that a cider-mill let into the ground by a tenant for life, or tenant in tail (*Anon.*, cited 3 Atk. 15), or fire engines or steam engines erected in a colliery (*Lawton v. Lawton*, 3 Atk. 13; *Dudley v. Warde*, Amb. 113), belong to his personal representative. Lord Hardwicke, in commenting on the latter case, observes, "The reason of emblements going to the executor of a particular tenant holds here,—to encourage agriculture; suppose a man of indifferent health, he would not erect an engine at a vast expense unless it should go to his family." See 2 Smith's L. C. 182, 7th edit., note to *Elwes v. Mawe*; *Amos & Fer. on Fix.* 137, 2nd edit.; *Brown on Fixtures*, 191, 3rd edit.; and *Fisher v. Dixon*, 12 C. & F. 312.

Estovers, Right of Tenant for Life to.

The owners of the inheritance, as they may alien or in any way dispose of the *whole* thereof, so they may fell timber, open mines, pull down houses, being merely a *part* thereof, and they would not be liable, either in law or equity, for waste. See *Liford's Case*, 11 Co. 50a; *Plowd.* 259; *Jervis v. Bruton*, 2 Vern. 251; *Attorney-General v. Duke of Marlborough*, 3 Madd. 498.

Where, however, a person has merely a limited interest in land, as tenant for life, and therefore cannot alien or dispose of the whole thereof, so he cannot in general do anything which would sever or destroy any part of the inheritance, or what forms a parcel thereof, as by felling timber, opening mines, pulling down

houses, which is termed waste, and will be examined into somewhat fully hereafter.

To avoid, however, the inconvenience which would result if too severe restrictions were placed upon persons having limited interests, the law allows to every tenant for life, as incident to his estate (unless restrained by special contract), three kinds of estovers,—viz. housebote, or a sufficient quantity of wood for the fuel and repairs of his house, ploughbote, sufficient wood for making and repairing agricultural implements; and haybote, for repairing fences. These estovers, however, must be reasonable. Co. Litt. 41 b.

However, what a person may lawfully take for estovers, he cannot apply for another purpose. Thus, although he may fell timber for repairs, he cannot sell it to pay the wages of the persons employed in making them (Br. "Waste," pl. 112); so if he suffers the timber to lie until it is rotten (Ib.), or fells more than is necessary, even if he alleges that it is wanted for future repairs (*Gorges v. Stanfield*, Cro. Eliz. 593), it is waste. So if he sell timber and employ the money for repairs, or even if he buy the timber again and employ it in repairs, yet "it is waste for the vendition" (Com. Dig. "Wast," (D) 5; Co. Litt. 53 b). Accordingly it was held in *Simmons v. Norton*, 7 Bing. 640, that in an action of waste for cutting timber, the defendant could not give in evidence, even in mitigation of damages, that the timber was cut for the purpose of necessary repairs, but turning out to be unfit

for that purpose, was exchanged for other timber which was applied to the repairs.

So a rector may cut down timber for the repairs of the parsonage house or chancel, and is entitled to botes for repairs (*Strachy v. Francis*, 2 Atk. 217); but he cannot sell the timber to defray the expense of ordinary repairs (*Duke of Marlborough v. St. John*, 5 De G. & Sm. 174), nor for the purpose of making a general repairing fund. *Sowerby v. Fryer*, 8 L. R., Eq. 417, 422.

And he may, perhaps, have a right to dispose of timber, and apply the proceeds in getting some other timber for repairs at a more convenient place. (Ib.) For it would be absurd to make a man who has cut down timber on an estate drag that selfsame timber the whole distance to the spot—it may be half-a-dozen or ten miles—off where it is wanted. For it will come to the same thing whether he uses the specific timber he has cut upon the woodwork repairs, or whether he sells it and buys timber of equal value to be applied for the same purpose. Ib.; and see *Wither v. Dean and Chapter of Winchester*, 3 Mer. 421, 426; *Knight v. Mosely*, Amb. 176.

The parson, however, with the consent of the patron and ordinary, but not of the patron alone (*Holden v. Weekes*, 1 J. & H. 278), may dispose of timber and open mines, and the Court would have no difficulty, on a proper application, in directing timber to be cut, and the produce to be applied for the benefit of the living (*Duke of Marl-*

borough v. St. John, 5 De G. & Sm. 179).

No presumption of a grant authorizing a parson to open a mine will be drawn from the fact that a mine under a glebe has for a long time been worked by underground passages from adjoining collieries. *Bartlett v. Phillips*, 4 De G. & J. 414.

The patron is the proper person to institute a suit to restrain the opening of mines, and generally the only proper person (*Holden v. Weekes*, 1 J. & H. 278, 285), but it seems that the ordinary may take proceedings to prevent waste by collusion between the patron and incumbent. *Ib.* See also *Knight v. Mosely*, 1 Amb. 175.

It appears to have been formerly laid down that the patron's right is only to restrain future waste, and does not extend to an account of past profits before the filing of the bill. See *Knight v. Mosely*, Amb. 176; and *Holden v. Weekes*, 1 J. & H. 278. In a recent case, however, Sir W. M. James, V. C., expressed a strong opinion that the patron has power to file a bill for an account against a vicar who has wrongfully cut timber after he has turned it into money, in order that it may be invested for the benefit of the advowson, it being conceded that the patron is entitled to the specific timber (*Sowerby v. Fryer*, 8 L. R., Eq. 417, 423); and in that case, where timber had been improperly felled, but not sold, by the vicar, his Honor held that the patron was entitled to an order from the Court that the timber might be sold, and the proceeds brought into Court. See 1 L. C., Eq. 801, 5th edit.

Waste.

With the exception that we have already mentioned in favour of tenant in tail after possibility of issue extinct, tenants for their own life or pour autre vie (unless made unimpeachable of waste), or tenants for life by operation of law, as tenant in dower or tenant by the curtesy, are bound not to commit what is termed waste. *Ap Rice's Case*, 3 Leon. 121; Co. Litt. 53a.

It may here be mentioned, that at common law waste was only punished in tenants for life by operation of law, viz. tenants in dower and tenants by the curtesy, but not in tenants for life by convention, for the law that created the estate of the former, gave also a remedy against them; but as the latter came in by the lease of the owner of the land, if he did not provide against his lessee doing waste, it was considered right that he should bear the consequence of his own negligence and default. By the Statute of Marlebridge (32 Hen. 3) and the Statute of Gloucester (5 Edw. 1), as laid down in the principal case, lessees for life, and lessees for years, were made punishable for waste.

Waste, which is of three kinds,—1st, actual or voluntary; 2ndly, permissive; 3rdly, equitable,—may be defined as the destructive or material alteration of things forming an essential part of the inheritance.

Actual or Voluntary Waste.

Actual or voluntary waste is an offence of commission, as in the destruction of houses by pulling them

down, or any fixtures thereto, such as wainscots, doors, windows, furnaces or the like (Co. Litt. 53a); cutting down or topping timber trees, so as to make them decay (Ib. As to what are timber trees, see *Honywood v. Honywood*, 18 L. R., Eq. 306, 310; *Dunn v. Bryan*, 7 L. R., Eq. 143); stubbing up underwood, which a tenant for life may lawfully cut down (Co. Litt. 53a); cutting down trees or fences, which, though not timber, are a shelter of the house (Ib.); or fruit trees growing in a garden or orchard (Ib.; Com. Dig. "Wast," D. 5). And although a tenant for life may cut down as underwood, willows in a plantation or wood, he cannot do so except in due course (*Humphreys v. Harrison*, 1 J. & W. 582; *Pigot v. Bullock*, 1 Ves. jun. 479; *Hampton v. Hodges*, 8 Ves. 105; and see *Phillips v. Smith*, 14 M. & W. 589), nor if they were planted by the side of a river to maintain the banks, as he would thereby commit waste. Br. "Waste," pl. 130, 143; *Sir George Stripping's Case*, cited 22 Vin. Abr. 449, pl. 11, note.

With regard to thinnings of plantations it has been held, that as between tenant for life and remainderman, the thinnings of fir trees under twenty years of age belong to the tenant for life (*Pidgeley v. Rawling*, 2 Coll. 275); and indeed all fair and proper thinnings, such as timber under twenty years of age, and all coppices cut periodically in the nature of crops. *Bateman v. Hotchkin*, 31 Beav. 487; *Earl Cowley v. Wellesley*, 1 L. R., Eq. 656; 35 Beav. 635;

Honywood v. Honywood, 18 L. R., Eq. 310.

A tenant for life, moreover, may cut down all trees not being timber (*Honywood v. Honywood*, 18 L. R., Eq. 310); with the exception that he must not, unless for the purpose of properly thinning, cut down those trees which, being under twenty years of age, are not timber but which would be timber if they were over twenty years of age. For if he cuts them down, he commits waste, as he prevents the growth of the timber. Ib. 310.

Digging pits for gravel, lime, clay, brick, earth, stone or the like, except for repairs, or for mines of metal, coal or the like, hidden in the earth, which were *not open* when the tenant for life came in, is waste (Co. Litt. 53 b; *Viner v. Vaughan*, 2 Beav. 466); but he has a right to continue the working of pits or mines previously opened, though not perhaps where they are old and abandoned, or where mere preparations had been made for opening them. *Clavering v. Clavering*, 2 P. Wms. 389; *Viner v. Vaughan*, 2 Beav. 466; *Spencer v. Scurr*, 31 Beav. 334, as to what is an old coal mine.

So in *Earl Cowley v. Wellesley*, 1 L. R., Eq. 656, 659, a tenant for life was held entitled to the income arising from the sale of gravel dug and taken from the waste land of a manor, which had been so dug and taken for many years.

So by the general law, a tenant for life has a right to the proceeds of an open brickfield. *Per* Bacon, V. C., in *Miller v. Miller*, 13 L. R., Eq. 268.

A fortiori will he be entitled thereto, where the profits are given to him even although the brickfields be vested in trustees upon a discretionary power to sell, if in the exercise thereof they do not sell. See *Miller v. Miller*, 13 L. R., Eq. 263. As to cutting turf in bogs, see *Coppinger v. Gubbins*, 3 J. & L. 397.

New pits or shafts may be made in working a mine already open, in order to pursue the same vein (*Clavering v. Clavering*, 2 P. Wms. 388; and *Hellier v. Twifodd*, there cited), or even a new vein. *Spencer v. Scurr*, 31 Beav. 334. See also *Bagot v. Bagot*, 32 Beav. 509.

The conversion of arable land by the tenant into wood, or è converso (Co. Litt. 53 b), or meadow into arable, is waste; for, as Lord Coke observes, "it changeth not only his course of husbandry, but the proof of his evidence" (Ib.). And in an action of waste for ploughing an ancient meadow, the defendant cannot, under the general issue, *nul wast*, give evidence that the ploughing was resorted to according to the custom of the country, for the purpose of ameliorating the meadow (*Simmons v. Norton*, 7 Bing. 640). As between tenant for life and remainderman, it is not waste to plough up pasture land held under lease, if it were not pasture at the date of the lease. *Morris v. Morris*, 1 Hog. 238.

A parson or vicar, however, is not to be considered as merely a tenant for life under a will or settlement; therefore the Court will not, on a bill filed by the patron, restrain him from ploughing up a meadow infested with moss and weeds, for

the purpose of laying it down in grass when properly cleaned. *The Duke of St. Albans v. Skipwith*, 8 Beav. 354. See *Hoskins v. Featherstone*, 2 Bro. C. C. 552, where the bill was filed against the widow of an incumbent. See also *Huntley v. Russell*, 13 Q. B. 572; *Duke of Marlborough v. St. John*, 5 De G. & Sm. 174.

Ploughing up a rabbit warren by charter or prescription is waste (Harg. Co. Litt. 53 a, note (8); *Angerstein v. Hunt*, 6 Ves. 488). *Secus*, if it be only lands stored with rabbits and not a legal warren. 22 Vin. Abr. tit. "Waste," 438, pl. 13; *Lurting v. Conn*, 1 Ir. Ch. Rep. 273.

Deer in a lawful park are part of the inheritance, and it is waste in a tenant for life to do anything to sever the deer from the inheritance; and it seems "that reclaiming deer is an act of waste, because it makes them no longer venison in a park, but chattels, like any other domesticated animals." Per Wood, V.C., in *Ford v. Tynte*, 2 J. & H. 153.

Permissive Waste.

Permissive waste is described by Lord Coke as an act of omission; as not doing repairs, whereby houses are suffered to fall into decay (2 Inst. 145); but it is not waste at common law, either voluntary or permissive, to leave land uncultivated (*Hutton v. Warren*, 1 Mees. & W. 472, per Parke, B.); and it has been said that permissive waste is equally within the Statute of Gloucester (6 Edw. 1, c. 5), as voluntary waste is. Co. Litt. 53 a.

It seems, however, to be doubtful

at the present day, whether an action will lie for permissive waste (*Powys v. Blagrove*, 4 De Gex, Mac. & Gord. 448; *Warren v. Rudall*, 1 J. & H. 13); the decisions, at any rate, seem to show that it cannot be maintained against tenant from year to year (*Gibson v. Wells*, 1 N. R. 290), or for years (*Herne v. Benbow*, 4 Taunt. 764; and see *Harnett v. Maitland*, 16 M. & W. 257), even if he has covenanted to repair, and leave the premises in as good a condition as they were at a certain period. *Jones v. Hill*, 7 Taunt. 392; 1 B. Moore, 100. See also 1 Wms. Saund. 323 d; 2 Wms. Saund. 252 b. See and consider *Yellowly v. Gower*, 11 Exch. 293, 294.

Although formerly a contrary opinion was expressed by Lord Hardwicke in *Partridge v. Powlet*, 2 Atk. 282, it seems now to be clearly settled that a Court of Equity would not interfere in cases of permissive waste by tenant for life having the legal estate, nor where it was vested in trustees indirectly through the medium of a trust created in the property. *Powys v. Blagrove*, 4 De Gex, Mac. & Gord. 448, where Lord Cranworth, affirming the decision of Sir W. Page Wood, V. C. (reported Kay, 495), said: "It was argued, independently of the trust, that it is the duty of a tenant for life to repair, 'equitas sequitur legem,' but even legal liability now is very doubtful (*Gibson v. Wells*, 1 N. R. 291; *Herne v. Benbow*, 4 Taunt. 764). Whatever be the legal liability, this Court has always declined to interfere against mere permissive

waste (*Lord Castlemaine v. Lord Craven*, 22 Vin. Abr. 523, tit. 'Waste,' pl. 11). There the Master of the Rolls said, 'the Court never interposes in case of permissive waste, either to prohibit or to give satisfaction, as it does in case of wilful waste.' On this ground relief was refused in *Wood v. Gaynon* (Amb. 395). In that case a tenant for life had been guilty of permissive waste, and the plaintiff and one of the defendants, B. Lyme, were reversioners; Lyme refused to join with the plaintiff in an action at law. The Master of the Rolls refused to assist the plaintiff, saying, that as there was no precedent, he would not make one; adopting the argument that it would tend to harass tenants for life and jointresses, and that suits of this kind would be attended with great expense in depositions about the repairs. With respect to the case of *Caldwell v. Baylis* (2 Mer. 408), it does not sustain the doctrine for which it was cited. The case of *Re Skingley* (3 Mac. & G. 221) was founded on the express obligation of the lunatic to keep in repair." *Gregg v. Coates*, 23 Beav. 33; *Warren v. Rudall*, 1 Johns. & H. 1, 13. See also *White v. McCann*, 1 Ir. C. L. Rep. 205.

As to legal liability for permissive waste, see *Greene v. Cole*, 2 Wms. Saund. 644, and notes; and *Harnett v. Maitland*, 16 M. & W. 257.

But an account would be granted where there was an express covenant from the tenant for life to repair. *Marsh v. Wells*, 2 S. & S. 87.

To whom Things severed from the Inheritance by Waste, &c. belong.

By whatever means—by act of God, as by a tempest, or by act of man, as by a trespasser, or by waste of the tenant—things are severed from the inheritance, whether they be the materials of a house, timber, or the produce of mines, they will become at once the property of the owner of the first estate of inheritance in esse, whether in fee or tail (*Uvedall v. Uvedall*, 2 Roll. Abr. 119; *Whitfield v. Bewit*, 2 P. Wms. 240; *Bewick v. Whitfield*, 3 P. Wms. 267; *Honywood v. Honywood*, 18 L. R., Eq. 311), even although there may be an intervening estate of freehold in a tenant for life without impeachment of waste (*Pigot v. Bullock*, 1 Ves. jun. 484; *Gent v. Harrison*, Johns. 517, 524); unless in the case of waste by a tenant for life, there has been collusion or acquiescence on the part of the owner of the inheritance. As to which, see *Garth v. Cotton*, 1 L. C., Eq. 751, 5th edit., and the note thereto. *Gresley v. Mousley*, 3 De G., F. & J. 433.

A tenant for life is, however, entitled to have the benefit arising from the sale of all such trees thrown down by the wind as he would be entitled to cut down himself. *Bateman v. Hotchkin*, 31 Beav. 486; *Bagot v. Bagot*, 32 Beav. 509, 518.

So where deer in a lawful park have been reclaimed by the tenant for life, he will not by such an act of waste acquire a property therein, but they will belong to the person entitled to the first estate of inheri-

ance in remainder (2 J. & H. 153; 154); but in a case where the deer had been reclaimed by the tenant for life, Sir W. Page Wood, V. C., in a suit by incumbrancers of the tenant for life, refused an application by remaindermen to prevent the receiver from letting the park, except as a deer park, and with proper covenants for preserving the deer, his Honor being of opinion that the deer being reclaimed he could not interfere to prevent the land being let in the best way; but he said that his decision upon this point had nothing to do with the question the remaindermen might thereafter be entitled to take with respect to any acts done to reclaim the deer. *Ford v. Tynte*, 2 J. & H. 150, 154.

Although a tenant for life be impeachable for waste, if the timber is in such a state that it is in danger of running to decay, the Court, in order to prevent actual waste or destruction from taking place, will, after proper inquiries, order the timber to be cut, and invest the money for the persons entitled to the inheritance, and will allow the tenant for life the interest so long as he lives. *Tooker v. Annesley*, 5 Sim. 235; *Waldo v. Waldo*, 7 Sim. 261; *Tollemache v. Tollemache*, 1 Hare, 456; *Consett v. Bell*, 1 Y. & C. C. C. 569. See 1 L. C., Eq. 823, 5th edit., and the cases there cited.

The rule is the same where a trustee has felled timber and the Court has adopted his act. *Ib.* 824.

Ordinarily the Court will not adopt the act of a tenant for life impeachable for waste, who will not

be allowed to derive any advantage from his own wrongful act (*Seagrave v. Knight*, 2 L. R., Ch. App. 632; *Williams v. Duke of Bolton*, 3 P. Wms. 268, n.). *Secus*, where he has cut down the timber not otherwise than in a due course of management, and has paid the money into Court. *Lowndes v. Norton*, 6 Ch. D. 139.

The jurisdiction of the Court to direct the fall and sale of timber on settled estates, except ornamental timber, is extended by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 16, repealing and re-enacting 19 & 20 Vict. c. 120, s. 11.

Tenant for Life without Impeachment of Waste.

Where, in an instrument making a person tenant for life, a clause is inserted that he is to be "without impeachment of waste," he may, as laid down in the principal case, fell timber, open new mines or pits (Co. Litt. 220 a, and the note 1*), and will have full property in the produce, as will also be the case where timber trees or timber parcel of a house are blown down; his interest, however, does not arise until the severance takes place. *Anon.*, Mos. 237; *Pyne v. Dor*, 1 T. R. 55; *Wolf v. Hill*; *Bridges v. Stephens*, 2 Swanst. 149, n., 150; *Williams v. Williams*, 15 Ves. 425. If, however, the severance of timber take place during the existence of a prior limited interest, the tenant for life without impeachment for waste could not maintain trover, inasmuch as it would vest immediately in the owner of the inheritance. 1 Ves. jun. 484.

Where timber has been felled by the order of the Court (*Tooker v. Annesley*, 5 Sim. 235), or by trustees (*Waldo v. Waldo*, 7 Sim. 261), the proceeds must be invested, the income paid to successive tenants for life, though impeachable for waste (*Tooker v. Annesley*, 5 Sim. 235; *Tollemache v. Tollemache*, 1 Hare, 456; *Ferrand v. Wilson*, 4 Hare, 381), and the capital transferred to the first owner of the inheritance or the first tenant for life, without impeachment of waste (*Waldo v. Waldo*, 12 Sim. 107; *Phillips v. Barlow*, 14 Sim. 263), as real estate. *Field v. Brown*, 27 Beav. 90. See *Gent v. Harrison*, Johns. 517.

Where the timber had been felled by the trustees, and debts which are a burthen on the inheritance have been paid by the sale of timber, a tenant for life without impeachment of waste is entitled to have the amount raised by the sale of the estates. *Davies v. Wescomb*, 2 Sim. 425.

If the clause were "without impeachment of any action of waste," no action could be brought against the tenant; but it seems he would not have the property in the thing severed by waste (Co. Litt. 220 a). This clause may be restricted by exceptions, as "except in houses," "voluntary waste in houses only excepted" (1 Ves. 265), and, as in *Garth v. Cotton* (Dick. 183; 1 L. Cas., Eq. 751, 6th edit.), "voluntary waste excepted," which would in fact only excuse permissive waste.

The words "without impeachment of waste, farther than wilful waste," were held sufficient to give

the tenant for life the interest of money arising from the sale of decaying timber, fallen by the order of the Court of Chancery. *Wickham v. Wickham*, 19 Ves. 419.

And where a man on his marriage settled his estate on himself for life, "without impeachment of or for any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses and buildings to go to decay, and in not repairing the same," it was held that he was entitled to cut all such timber (except ornamental) as the owner of the estate in fee simple, having due regard to his present interest and to the permanent advantage of the estate, might properly cut in a due course of management. *Vincent v. Spicer*, 22 Beav. 380.

So the exemption from liability to waste, annexed to a life estate, may be made subordinate to a discretionary power in trustees to fell timber, and the Court of Chancery has by injunction restrained the tenant for life from cutting timber so as to interfere with the discretionary power of the trustees, provided there were no mala fides, nor any wanton or unreasonable exercise of their discretion. *Kekewich v. Marker*, 3 Mac. & Gord. 311; and see *Briggs v. Earl of Oxford*, 5 De Gex & Sm. 156.

As to when, in carrying into effect executory trusts, a tenant for life will be made dispunishable for waste, see note to *Glenorchy v. Bosville*, 1 L. C. Eq. 40, 5th ed., and cases there cited.

As to the effect of an assignment
T.L.C.

by tenant for life without impeachment of waste of timber and timber-like trees, see *Gordon v. Woodford*, 6 Jur., N. S. 59; 27 Beav. 603.

It has been before said that a tenant for life without impeachment of waste only acquires an interest in timber upon its actual severance from the estate; hence it has been held that where trustees, under a common power of sale and exchange, sell any estate without the timber, the tenant for life, although without impeachment for waste, cannot lay claim to the money for which the timber is sold (*Doran v. Wiltshire*, 3 Swanst. 699; *Wolf v. Hill*, 2 Swanst. 149, note); and moreover, such an exercise of the power has been decided to be bad at law, nor has the subsequent investment of the price of the timber by the tenant for life in the names of the trustees been deemed sufficient to give validity to the transaction, and a bill in equity to make good the defect in the sale has been dismissed. See *Cholmeley v. Paxton*, 3 Bing. 207; S. C. nom. *Cockerell v. Cholmeley*, 10 B. & C. 564; *Wolf v. Hill*, 2 Swanst. 149, n.; *Doran v. Wiltshire*, 3 Swanst. 699; *Cholmeley v. Paxton*, 5 Bing. 48; *Cockerell v. Cholmeley*, 3 Russ. 565; 1 Russ. & My. 418, 424; 6 Bligh, N. S. 120; 1 C. & F. 60. See Sug. Prop. 491. See also *Adney v. Field*, Amb. 654; *Stratford v. Lord Aldborough*, 1 Ridg. 281; *Scott v. Davis*, 4 My. & Cr. 87.

Upon the same principle the sale of the surface of land under the ordinary power of sale, reserving the minerals, was held to be invalid.

Buckley v. Howell, 29 Beav. 546; see Art., 8 Jur., N. S. Part 2, 235.

However, by the Property and Trustees Relief Amendment Act (22 & 23 Vict. c. 35), s. 13, where under a power of sale a bonâ fide sale shall have been made of *an estate with the timber thereon, or any other articles attached thereto*, and the tenant for life, or any other party to the transaction, shall by mistake be allowed to receive for his own benefit a portion of the purchase money as the value of the timber or other articles, the Court of Chancery, upon payment of the full value of the timber or articles, at the time of the sale, with interest and the settlement thereof, may declare the sale valid, and thereupon the legal estate is to vest as if the power had been duly executed.

Under the Settled Estates Act, 1877 (40 & 41 Vict. c. 19), repealing and re-enacting the Settled Estates Act (19 & 20 Vict. c. 120), the Court may authorize a sale of the timber not being ornamental on settled estates (see sect. 16). Moreover, on the sale of any land under the act "any earth, coal, stone or mineral may be excepted" (sect. 13). And on a sale of mines apart from the surface, with rights of using the surface for the workings, a rent may be reserved in respect of the surface damage from time to time. *In re Milward's Estate*, 6 L. R., Eq. 248.

By the Confirmation of Sales Act (25 & 26 Vict. c. 108), no sale, exchange, partition or enfranchisement made in exercise of a trust or power not forbidding the exception

or reservation of minerals is to be invalid (unless already declared to be so, or there is a suit pending), on the ground only that the trust or power did not expressly authorize an exception or reservation of minerals which has been made (sect. 1); and hereafter such exception or reservation may be made by trustees and others with the sanction of the Court of Chancery, to be obtained on petition (sect. 2). The act does not, however, extend to Ireland or Scotland. Sect. 3.

As to the decisions under this act see 1 L. C., Eq. 267, 5th edit.

Procedure in Cases of Waste.

Formerly, one mode of proceeding in case waste was committed was by an action at common law upon a writ of waste (see *Jefferson v. Bishop of Durham*, 1 Bos. & Pul. 120); but it was in many respects both inconvenient and ineffective, and has been some time since abolished (3 & 4 Will. 4, c. 27, s. 36). Another mode of procedure at law was by an action on the case. 2 Wms. Saund. 252, n. 7; and see 21 & 22 Vict. c. 27, ss. 2, 3.

Many inconveniences, however, being found to attend the procedure at law, resort was usually had to Courts of Equity; inasmuch as they not only had previous to 17 & 18 Vict. c. 195, exclusive jurisdiction by injunction to interfere to prevent the threatened commission of waste, or forbid a continuance of it, but had also full power to take accounts and give compensation for past waste (see *Drew. Injunct.* 134); but by 17 & 18 Vict. c. 125, s. 79,

where an action at law had been brought, a writ of injunction might be obtained, from the Court of Law in which such action was brought, against the repetition or continuance of the injury.

Waste formerly cognizable only in Equity termed Equitable Waste.

Courts of Equity not only interfered to prevent waste at law, but also waste for which there was formerly no remedy at law, and which was hence termed *equitable waste*.

The first class of cases was where, in consequence of the intervention of a mesne remainder for life, the person having the inheritance in remainder or reversion could not proceed at law against the prior tenant for life; the person having the inheritance only having power at law to proceed against the *immediate* tenant for life; Courts of Equity granted an injunction to restrain waste. See Moore, 554; *Tracy v. Tracy*, 1 Vern. 23; *Farrant v. Lovel*, 723; and see note to *Garth v. Cotton*, 1 L. C., Eq. 802, 5th edit.

Again, although as we have seen where there had been a severance of timber, the person having a vested remainder in the inheritance would be entitled to it, nevertheless where a tenant for life and remainderman in fee, by collusion committed waste, as by felling timber, before a prior contingent remainderman in fee came into existence, a Court of Equity would, if there were any estate of freehold interposed, whether vested in trustees or any other persons, interpose by injunction. *Garth v. Cotton*, Dick. 183; 3 Atk. 751; 1 Ves. 546; 1 L. Cas.

Eq. 802, 822, 823, 5th edit., and cases there cited.

The most remarkable interposition of Courts of Equity was in restraining a tenant for life, although "without impeachment of waste," from committing malicious, extravagant and humorsome waste; such as pulling down or dismantling a mansion-house (*Vane v. Lord Barnard*, 2 Vern. 738; Pr. Ch. 454; Gilb. Eq. Rep. 127), or even farmhouses, unless it were intended to make two into one (*Aston v. Aston*, 1 Ves. 265), grubbing up a wood so as to destroy it absolutely (Ib.), felling timber planted or left standing for shelter or ornament of a mansion-house or grounds (*Rolt v. Lord Somerville*, 2 Eq. Ca. Abr. 759; *Packington's Case*, 3 Atk. 215; *Strathmore v. Bowes*, 2 Bro. C. C. 166; *Chamberlyne v. Dummer*, 1 Bro. C. C. 166; 3 Bro. C. C. 549; *Campbell v. Allgood*, 17 Beav. 623; *Ford v. Tynte*, 2 De G., Jo. & Sm. 127), even if planted by the tenant for life himself. *Coffin v. Coffin*, Jac. 71.

And a tenant in tail after possibility of issue extinct, although as we have seen from the nature of his estate unimpeachable of waste, would be restrained from committing wilful and malicious waste. *Attorney-General v. Duke of Marlborough*, 3 Madd. 538; *Abraham v. Bubb*, 2 Show. 69; 2 Freem. 52; 2 Eq. Ca. Abr. 757; 2 Swanst. 172; *Anon.*, 2 Freem. 278; *Cooke v. Whalley*, 1 Eq. Ca. Abr. 400.

By a recent act the *legal* power of a tenant for life without impeachment of waste to commit equitable waste is taken away. See the Ju-

dictature Act, 1875 (36 & 37 Vict. c. 66), which enacts, that "an estate for life without impeachment of waste shall not coufer, or be deemed to have conferred, upon the *tenant for life* any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate." Sect. 25, sub-sect. 3.

Tenants for years, and tenants in tail after possibility of issue extinct, are not mentioned in this section (25), but probably are brought within it by sub-section 11, according to which, if there is a conflict or variance between the rules of equity and the common law, the former will prevail. Trower's Prevalence of Equity, p. 22.

It appears that the doctrine relative to the produce of legal waste, viz. that it at once vests in the first owner of the inheritance *in esse*, is applicable to equitable waste; as where a tenant for life without impeachment of waste (*Wellesley v. Wellesley*, 6 Sim. 497, 503; *Lansdowne v. Lansdowne*, 1 Madd. 140; *Duke of Leeds v. Earl Amherst*, 14 Sim. 357; 2 Ph. 117; *The Marquis of Ormonde v. Kynnersley*, 15 Beav. 10, note; *Rolt v. Somerville*, 2 Eq. Ca. Ab. 759), or his assignees in bankruptcy (*Lushington v. Boldero*, 15 Beav. 1; *Duke of Leeds v. Amherst*, 2 Ph. 217), should fell ornamental timber. See, however, *Lushington v. Boldero*, 13 Beav. 418; and the

dictum of Sir G. Jessel, M. R., in *Honywood v. Honnywood*, 18 L. R., Eq. 311.

An equitable tenant for life must not cut timber without the trustees' consent (*Denton v. Denton*, 7 Beav. 388); and where he has done so the remainderman has a lien, as against the tenant for life and his mortgagees, on rents accrued during his life, to recoup the estate. *Briggs v. Earl of Oxford*, 1 Jur., N. S. 817.

As to when and how the remedy for waste is barred, see 1 L. Cas. Eq. 826, 5th edit.

See the cases upon the subject of equitable waste collected in the note to *Garth v. Cotton*, 1 L. Cas. Eq. 751, 5th edit.

Death of Tenant for Life—Onus of proving.

The onus of proving the fact that a tenant for life is either alive or dead, lies upon the persons who claim property in either of those events; if, for instance, a tenant for life mortgage his life interest, the mortgagee claiming to be paid the income must prove the fact that the tenant for life is living, it is equally incumbent upon those entitled to the property subject to the life interest to prove that he is dead. See *Hickman v. Upsall*, 20 L. R., Eq. 136; *In re Phené's Trusts*, 5 L. R., Ch. App. 139; *In re Lewes' Trust*, 6 L. R., Ch. App. 356; *Prudential Assurance Company v. Edmunds*, 2 App. Cas. 487.

SIR MILES CORBET'S CASE (*a*).

Hil. 27 Eliz., in the Exchequer.

[REPORTED 7 Co. 5 a.]

- COMMONS.]—*Resolved*, 1. *Where one has purchased divers parcels of lands in D., together, in which the inhabitants have used to have shack, and long since has inclosed it: and notwithstanding always after harvest the inhabitants have had shack there, by passing into it by bars or gates with their cattle, then it shall be taken as common appendant or appurtenant, and the owner cannot exclude them of common; but if in the town of S. the custom and usage hath been, that every owner in the same town hath inclosed his own lands from time to time, and so hath held it in severalty, any owner may inclose, and hold in severalty, and exclude himself to have shack with the others.*
2. *If the commons of the town of A. and of the town of B. are adjoining, and one ought to have common with the other, by reason of vicinage, and in A. there are fifty acres, and in B. one hundred acres of common, the inhabitants of A. cannot put more cattle into their common of fifty acres than it will feed; nec è converso.*

BETWEEN Sir Edward Clere and Miles Corbet (then Esq. and now a Knight) it was resolved in a case concerning the parsonage of Marham, in the county of Norfolk, that where in the county of Norfolk there is a special manor of common, called Shack, which is to be taken in arable land, after harvest, until the land be sown again, &c. And it began in ancient time in this manner; the fields of arable land in this country consist of the lands of many and divers several persons lying intermixed in many and several small parcels, so that it is not possible that any of them, without trespass to the others, can feed their cattle in their own land, and therefore

(*a*) *Clere v. Corbet.*

every one doth put in their cattle to feed promiscuè in the open field. These words "to go to shack," are as much as to say, to go at liberty, or to go at large; in which the policy of old times is to be observed, that the severance of fields in such small parcels to so many several persons was to avoid inclosure, and to maintain tillage. But it is to be observed, that the said common called Shack, which in the beginning was but in the nature of a feeding, because of vicinage for avoiding of suit, within some places of that country, is by custom altered into the nature of a common appendant or appurtenant, and in some places it retains its original nature; and the rule to know it, is the custom and usage of every several town or place, for (*a*) *consuetudo loci est observanda*. And, therefore, if in the town of D. (*exempli gratiâ*) one who hath purchased divers parcels together, in which the inhabitants have used to have shack, and long time since has inclosed it; and notwithstanding always after harvest the inhabitants have had shack there by passing into it by bars or gates with their cattle, there it shall be taken as common appendant or appurtenant, and the owner cannot exclude them of common there, notwithstanding he will not common with them, but hold his own lands so inclosed in severalty; and that is proved by the usage, for notwithstanding the ancient inclosure, the inhabitants have always had common there. But if in the town of S. the custom and usage hath been, that every owner in the same town hath inclosed his own lands from time to time, and so hath held it in severalty, there this usage proves, that it was but in the nature of Shack originally, for the cause of vicinage, and so it continues: and, therefore, there he may inclose and hold in severalty, and exclude himself to have shack with the others. And although in the said case of the town of D. the usage hath been, that notwithstanding the inclosure by divers inhabitants of late times, the other inhabitants have had shack there; yet if a man hath an ancient close of ancient time taken out of the field, and he and all those whose estate he hath have held it always in severalty, he may well keep it inclosed: for as to such parcel so anciently inclosed, the shack there doth retain its ancient and original nature; and he who claims shack there cannot prescribe to have common in it.

Nota, a good resolution, which stands with reason, and no inconvenience, innovation, or cause of suits or trouble can thereupon arise,

(*a*) 4 Co. 28b; 6 Co. 67a; 10 Co. 140a.

but quiet and repose will be thereby in many cases established, which I thought fit to be reported, because it is a general case in the said country, and at first the Court was altogether ignorant of the nature of this common called shack.

It was also resolved at the same time, that if the commons of the town of A. and of the town of B. are adjoining, and that one ought to have common with the other by reason of vicinage; and in the town of A. there are fifty acres of common, and in the town of B. there are a hundred acres of common; in that case the inhabitants of the town of A. cannot put more cattle into their common of fifty acres than it will feed, without any respect to the common within the town of B., *nec è converso* (*b*); for the original cause of this common for cause of vicinage was not for profit, but for preventing suits in a champaign country: for the reciprocal escapes of the one town into the other; and, therefore, if the common of the town of A. will feed fifty beasts, and of the town of B. a hundred beasts, it is no prejudice to the one or the other, if the cattle of the one town escape and feed in the common of the other town reciprocally; for if all the cattle feed promiscuè together through the whole, it will be no prejudice to one or the other.

[Note, the like intercommoning is in Lincolnshire, Yorkshire and other counties, and in Mich. Term, 18 Car. 2, B. R., Twisden, Justice, said, that this common called shack was but common pur cause de vicinage.]

(*b*) 4 Co. 38b; Co. Litt. 122a.

TYRRINGHAM'S CASE (a).



Mich. 26 & 27 Eliz., in the King's Bench.

[REPORTED 4 Co. 36 a.]

COMMONS.]—*T. S., seised of a house, land, meadow and pasture, to which he and all those whose estate he had, agreed to have common of pasture for oxen, cows and heifers, levant and couchant, upon the house, land, meadow and pasture, as well in thirty acres in the same town, of which A. was seised in fee, as in forty acres of land whereof B. was seised in fee, to the said house, land, meadow and pasture appertaining. Afterwards B. purchased the said house, land, meadow and pasture, to which all, &c., to him and his heirs, and demised the same to plaintiff, who put his cattle into the said thirty acres to common, and they were driven out by defendant, farmer of A., with a little dog:—Held, 1st. That prescription does not make a thing appendant to another, unless it agree in nature and quality with it, as a thing corporeal cannot be appendant to another corporeal thing, nor vice versâ; but a thing incorporeal may be appendant to a thing corporeal, or è converso; though a thing incorporeal cannot be appendant to a thing corporeal which does not agree with it in nature, as a common of turbary cannot be appendant to land, but to a house it may. The common appendant is of common right, and need not be prescribed for; but it only belongs to ancient arable land, and for horses and oxen to plough, and cows and sheep to manure the land; it cannot be appendant to meadow or pasture, and therefore the prescription being for common appendant time out of mind to a house, meadow and pasture, as well as arable land, the common was appurtenant and not appendant. 2ndly. Common appendant, being of common right, is apportionable by the commoners purchasing part of the land to which, &c., as rent is, on the lord's purchasing part of the tenancy, so by his alienation of part of the*

(a) *Phasant v. Salmon*, 13 Co. 66; 2 Brownl. 47; and see 1 Wms. Saund. 23 b, n.

land to which the common is appendant. But common appurtenant, being against common right, by the said purchase all the common was extinguished. 3rdly. Unity of possession of the whole land is an extinguishment of common appendant. 4thly. Common by vicinage is not common appendant; but inasmuch as it ought to be by prescription, time out of mind, it is, in this respect, resembled to common appendant. And one may inclose against the other, for one cannot put his cattle into the lands of the other but they must escape thither, in which case the trespass is excused by reason of the ancient usage. 5thly. That when the plaintiff's cattle trespass on the defendant's land he might chase them out with a little dog, without being compelled to distrain them. Common appendant remains though a house be afterwards built on the land, or the arable land be converted to pasture; but in pleading, it ought to be prescribed for as appendant to land. So it may be appendant to a manor, carve of land, &c., though it comprehend a house, meadow, &c.

When common appendant is apportionable by purchase of part of the land, the commoner ought to prescribe for the whole, till such a day when he purchased; when by sale the alienee may prescribe for common appendant to his parcel.

Common being apportioned by purchase of part, if an assize be brought the terre-tenant of the land charged with the residue of the common shall be only charged.

Common appurtenant and in gross may commence either by grant at this day or by prescription.

In case of common by vicinage between adjoining manors, the lord of one manor may inclose against the others, and thereby take away such common.

IN trespass between Phesant plaintiff, and Salmon defendant, the case was such. Thomas Tyrringham was seised of a house, forty-four acres of land, seven acres of meadow, and two acres of pasture, in Titmersh in the county of Northampton; to which house, land, meadow and pasture, he, and all those whose estate he had, had used to have common of pasture for oxen, cows and heifers, levant and couchant, upon the house, land, meadow and pasture, as well as in thirty acres of land in the same town (whereof one John Pickering was then seised in fee), as in forty acres of land and pasture in

Titmersh aforesaid (whereof one Boniface Pickering was then seised in fee), as to the said house, land, meadow and pasture appertaining. And afterwards the said Boniface Pickering, being seised as aforesaid of the said forty acres, purchased to him and his heirs the said house, forty-four acres of land, seven acres of meadow, and two acres of pasture, to which, &c. And being so seised as well of the said forty acres in which, as of the said tenements to which, &c., demised the house, land, meadow and pasture to which, &c., to Phesant, who put in two cows into the said thirty acres to use the said common; and the said Salmon, who was farmer of the said John Pickering, with a little dog levitèr et mollitèr drove out the said cows, and the said Phesant brought his action of trespass for chasing his cattle.

In this case divers points were resolved by Wray, C. J., Sir Thomas Gawdy *et per totam Curiam*.

First, that prescription does not make a thing appendant, unless the thing which shall be appendant agrees in quality and nature to the thing to which it shall be appendant; as a thing corporate cannot be appendant to a thing corporate, nor a thing incorporate to a thing incorporate; as it is held in *Hill and Grange's Case*, Plow. Com. 168 a, b. But a thing incorporate, as an advowson, may be to a thing corporate as to a manor, or a thing corporate, as land, to a thing incorporate as an office, as it is there also held; but every thing incorporate cannot be appendant to a thing corporate, as common of turbary cannot be appendant to land but to a house, as it is held in 5 Ass. 9; for the thing which is appendant ought to agree with the nature and quality of the thing to which it is appendant, and turfs are to be spent in a house. So, 10 E. 3, 5, a leet cannot be appendant to a church or chapel, for they are of several natures.

The beginning of common appendant by the ancient law was in such manner. When a lord enfeoffed another of arable land, to hold of him in socage, i. e. *per servitium socæ*, as every such tenure at the beginning (as Littleton saith) (*b*), was, that the feoffee *ad manutenendum servitium socæ*, should have common in the lord's wastes for his necessary cattle which ploughed and manured his land, and that for two reasons:—1st, Because it was, as it was then held, *tacitè* implied in the feoffment; for the feoffee could not plough and manure his land without cattle, and they could not be kept without pasture, *et per consequens* the feoffee

(*b*) Litt. sect. 119; Co. Litt. 89 b.

should have (as a thing necessary and incident), common in the lord's wastes and land, and that appears by the ancient books, in temp. E. 1, Common, 24, and 17 E. 2, Common, 23, and 20 E. 3, Admeasurement, 8, and 18 E. 3; and by the rehearsal of the Statute of Merton, cap. 4. The 2nd reason was for the maintenance and advancement of tillage, which is much respected and favoured in law, so that such common appendant is of common right, and commences by operation of law, and in favour of tillage, and therefore it is not necessary to prescribe therein, as it is held in 4 H. 6, and 22 H. 6, as it would be if it was against common right; but it is only appendant to ancient land, arable, hide and gain (c), and only for cattle, sc. horses and oxen to plough his land, and cows and sheep to manure his land, and all for the bettering and advancement of tillage, and with this resolution agree 37 H. 6, 34 a, b, *per tot. Cur.*, and 26 H. 8, 4 a, as to this latter point, and therefore it is against the nature of a common appendant to be appendant to meadow or pasture; and because, in the case at bar, the prescription was to have common appendant from time whereof, &c., to a house, meadow and pasture, as well as to arable land, by which it appears to the Court that there had been a house, meadow and pasture, from time whereof, &c., it was therefore resolved, that this common was *appurtenant* and not appendant. But if a man has had common for cattle which serve for his plough appendant to his land, and perhaps of late time a house is built upon part, and some part is employed to pasture and some for meadow; and that for maintenance of tillage, which was the original cost of the common; in this case the common remains appendant, and shall be intended, in respect of the continual usage of the common, for cattle levant and couchant upon such land; at the beginning all was arable, but in pleading he ought to prescribe to have it appendant to land, and, although *terra dicitur à terendo, quia vomere teritur*, yet *terra* includes all, and although now it is pasture or meadow, yet it is arable, i. e. may be ploughed, although it is not now in tillage and ploughed: but if he prescribes to have it appendant to a house, or meadow or pasture, then it appears of his own showing (as hath been said), that it had been at all times a house, meadow and pasture, and then he cannot have common as appendant to it, but such is common appurtenant. A man may prescribe to have common appendant to his manor, for all the demesnes shall be intended arable, or, at least, shall be in con-

struction of law *reddendo singula singulis* appendant to such demesnes as are ancient arable land, and not to any land newly ploughed and improved to be arable out of his wastes and moors parcels of the manor, and therewith agrees 5 Ass. 2. Also, when a man claims common appendant to his manor, no incongruity, as in the case at bar, appears of his own showing. So, common may be claimed to be appendant to a *carve* of land, and yet a *carve* of land may contain pasture, meadow and wood, as it is held in 6 E. 3, 42; but no incongruity appears there, and it shall be applied to *that* which agrees with the nature and quality of the common appendant.

2. It was resolved, that common appendant may be apportioned for two reasons :—1. Because it is of common right, and, therefore, if the commoner purchases parcel of the land in which, &c., yet the common shall be apportioned; as if the lord purchases parcel of the tenancy, the rent shall be apportioned. So if A. has common appendant to twenty acres of land, and enfeoffs B. of part of the said twenty acres, to which, &c., this common shall be apportioned, and B. shall have common *pro ratâ*; and where it was objected—1. That the prescription fails in both the cases; for, in the first case, he never had common in part of the land only, but entirely in all, and it would be now a prejudice to the terre-tenant, if he should have common in the thirty acres only, for all the cattle levant and couchant upon all the tenements to which, &c.; and, in the latter case, no common was ever appendant to part of the land, but entirely to the whole; also,—2. In assise of common, all the terre-tenants ought to be named, and that cannot be when the commoner himself has purchased part of the land. As to these objections it was answered and resolved, that, as to the first, the prescription ought to be special, *sc.* to prescribe to have common in the whole till such a day, and then to show the purchase of part, and from that time that he has put *in* his cattle into the residue *pro ratâ portione*, as in the cases when a corporation has liberties by prescription, and within time of memory the corporation is altered, there ought to be a special prescription; as to the second case, *sc.* when part of the land to which, &c. is aliened, there every of them may prescribe to have common for cattle levant or couchant upon his land, and in none of these cases any prejudice accrues to the tenant of the land in which the common is to be had, for he shall not be charged with more upon the matter than he was before the severance; and God forbid the law

should not be so, when part of the land to which, &c., is aliened; for otherwise, many commons in England (which God forbid), would be annihilated and lost; and it was agreed, that such common which is admeasurable, shall remain after the severance of part of the land to which, &c. But in the case at bar, forasmuch as the Court resolved that common was appurtenant and not appendant, and so against common right, it was adjudged that, by the said purchase, all the common was extinct; for in such case common appurtenant cannot be extinct in part, and be *in esse* for part by the act of the parties. And as to the last objection, it was answered and resolved, that, if upon the matter the common appendant should be apportioned, then the terre-tenant should be only named out of the land charged with the residue of the common, as in the case where a rentcharge is apportioned in case of descent, the tenant of the land shall be only named out of which the residue of the rent which remains issues. And it was said in this case, this word *pertinens* is Latin as well for appurtenant as for appendant, and therefore *subjecta materia*, and the circumstance of the case ought to direct the Court to judge the common to be appendant or appurtenant. 3. It was resolved, that unity of possession of the whole land to which, &c., and of the whole land in which, &c., makes extinguishment of common appendant against the opinions, 11 E. 3, Common, 11; 14 Ass. 21; 15 Ass. 2; 20 E. 3, Admeasurement, 8. The reason of which opinions was, because the land to which the common was claimed was ancient land, hide and gain, and for maintenance and advancement of tillage, but inasmuch as it was against a rule in law, sc. when a man has as high and perdurable estate as well in the land as in the rent, common and other profit issuing out of the same land, there the rent, common and profit is extinct, and therewith agrees 24 E. 3, 25. 4. In this case Wray, C. J., said, that common for cause of vicinage is not common appendant, but inasmuch as it ought to be by prescription, from time whereof, &c., as common appendant ought, it is in this respect resembled to common appendant; but common appurtenant and in gross may commence either at this day by grant or be by prescription. And Wray, C. J., further said, that in case of common of vicinage the one may enclose against the other, for he who has such common cannot put his cattle into the land of the other, but he ought to put them in the land where he has common, and if they stray into the other land they are excused

of trespass, by reason of the ancient usage which the law allows to avoid suits which would arise if actions should be brought for every such trespass, when no separation or enclosure is between the commons; and therefore he said, that one may enclose against the other, for cessante causâ cessat effectus. 5. It was resolved without any difficulty, that when the plaintiff's cattle came into the defendant's land, and did him trespass, the defendant with a little dog might chase them out, and should not be compelled to distrain them for damage feasant. Nota, reader, according to the said opinion of Wray, C. J., it was now lately adjudged in the King's Bench, between Smith plaintiff, and How and Redman defendants, where the case was that two lords of two several manors had two wastes adjoining, (parcels of their manors joining,) without inclosure or separation, and yet the bounds of each manor were well known by certain bounds and marks, in which wastes the tenants of the one manor and of the other had reciprocally common for cause of vicinage: in that case one may inclose against the other, and thereby utterly toll the common for cause of vicinage: against which two objections were made;—1. Because it had been used by prescription from time whereof, &c., the beginning of which cannot be known, it would be hard now to break *that* which has had such continuance; for as it is said, "*obtemperandum est consuetudini rationabili tanquam legi.*" 2. Perhaps the waste of one was greater or of greater value than the other, and probably those who had the less at the beginning gave recompense to have his common in the greater, and therefore it would be now unreasonable to undo or defeat it. As to these it was answered and resolved, that the prescription imports the reciprocal cause in itself, sc. for cause of vicinage, and no other cause can be imagined; and forasmuch as it is *potius* an excuse of trespass, when the cattle of the tenants of the one manor stray into the waste of the other manor, than any certain inheritance; for it was resolved clearly that the tenants of the one manor could not put their beasts into the wastes of the other manor, but they should come there only by escape, and that the inclosure is only to prevent the escape of the cattle (which is a lawful act), for these reasons it was adjudged that the one might inclose against the other.

Nota, reader, it is true that agriculture and tillage is greatly respected and favoured as well by the common law as by the common

assent of the king, lords spiritual and temporal, and all the commons in many parliaments. 1. The common law prefers arable land before all other, and therefore for its dignity it ought to be named in a præcipe before meadow, pasture, wood or any other soil; and it appears by the statute of 4 H. 7, c. 19, that six inconveniences are introduced by subversion or conversion of arable land into pasture, tending to two deplorable consequences. The first inconvenience is the increase of idleness—the root and cause of all mischiefs. 2. Depopulation and decrease of populous towns, and maintenance only of two or three herdsmen, who keep beasts in lieu of great numbers of strong and able men. 3. Churches for want of inhabitants run to ruin and are destroyed. 4. The service of God neglected. 5. Injury and wrong done to patrons and curates. 6. The defence of the land for want of men strong and enured to labour against foreign enemies weakened and impaired. The two consequences are:—1. These inconveniences tend to the great displeasure of God. 2. To the subversion of the policy and good government of the land, and all this by decay of agriculture, which is there said to be one of the greatest commodities of this realm, which one act of parliament as to this purpose may, as a figure in arithmetic, in the third place, stand for a hundred: but I have observed that the most excellent policy, and assured means to increase and advance agriculture, is to provide that corn shall be of reasonable and competent value; for make what statutes you please, if the ploughman has not a competent profit for his excessive labour and great charge, he will not employ his labour and charge without a reasonable gain to support himself and his poor family.

Tyrringham's Case is a leading authority upon the law relating to commons and rights of common, the various kinds of which, their origin and incidents, are therein described by Lord Coke with his usual perspicuity and learning.

A right of common may be defined as a right which one person has of taking some part of the produce of land, while the whole

property of the land itself is vested in another. Burt. Comp. 353; Bract. c. 38, fol. 222.

There are four kinds of commons:—I. Common of pasture, or the right of feeding beasts upon the land of another; II. Common of piscary, or the right of fishing in the waters of another; III. Common of estovers, or the right of cutting wood on the land of another;

IV. Common of turbary, or the right of digging turves on the soil of another. To which perhaps may be added the similar right of getting sand, clay, stone, and even coals and other minerals on another's land (Co. Litt. 122a). These it is proposed to examine seriatim.

V. We will next consider how the right of common may be acquired; VI. The incidents to rights of common, and herein of the respective rights of the lord and commoners; VII. The alienation of rights of common; VIII. The extinguishment of rights of common.

I. *As to Common of Pasture.*

Common of pasture is of four kinds:—1. Appendant; 2. Appurtenant; 3. By reason of vicinage; 4. In gross.

1. *Common of Pasture Appendant.*

Common of pasture appendant, as is laid down in *Tyrringham's Case*, had its origin from the favour shown by the common law to tillage; for when the lord of a manor enfeoffed another of *arable land to hold of him in socage*, it was at a very early period held to be tacitly implied, by mere operation of law, that the tenant should have, *of common right*, liberty to depasture in the lord's wastes such cattle as were necessary or useful in agriculture, such as "horses and oxen to plough, and cows and sheep to manure his land;" but for no other animals, such as hogs, goats or geese, as in the case in commons appurtenant (37 Hen. 6, 34; F. N. B. 180; Co. Litt. 122 a; *Tyrringham's Case*, ante, p. 123). Hence a plea claiming

common appendant *for all kinds of beasts* cannot be supported. 37 Hen. 6, 34; 25 Ass. pl. 8; *Standred v. Shorditch*, Cro. Jac. 580.

As all manorial tenures must have been created before the Statute of Quia Emptores (18 Edw. 1), it is clear that a common appendant cannot be created at the present day (1 Roll. Abr. 396, C. 2; 26 Hen. 8, 4, 15). It can be claimed therefore only by prescription; but, as under a claim of a common appendant a title by prescription is implied, a person claiming to be entitled to a common appendant has no occasion to plead prescription, but merely that the common is appendant. Co. Litt. 121 b, 122 a, note 177, by Harg.; *Hayes v. Bridges*, Ridg. L. & S. 410.

This kind of common is in general only appendant to *arable land*, and not to a house, meadow or pasture. 1 Roll. Abr. 397, E. 28, 29; *Scholes v. Hargreaves*, 5 T. R. 46.

Where, however, originally all the land was arable, the mere fact of a house having been built upon part of the land, or part of it having been converted into meadow or pasture, will not, if there has been a continual usage of common for cattle, levant and couchant, upon such land, destroy the original right. *Tyrringham's Case*, ante, p. 104.

The right of common, however, should be properly pleaded as appendant to the *land*; for if, as in *Tyrringham's Case*, the owner of the land prescribes to have it as appendant to a *house*, meadow or pasture, as it appears by his own showing that the nature of the

property is such as, according to the rules before laid down, common cannot be appendant thereto, it will be held that such common is *appurtenant*.

In some cases common of pasture has been held appendant to a cottage; this was because at one time by 31 Eliz. c. 7 (repealed by 15 Geo. 3, c. 32), a cottage must have had four acres of land attached to it (*Emerton v. Selby*, 2 Ld. Raym. 1015; and see 5 T. R. 49). So likewise common may be appendant to a messuage, where, in addition to a house, land is considered as included in that term (see 5 T. R. 49; *Benson v. Chester*, 8 T. R. 396). So likewise it may be claimed as appendant to a manor, farm, plough-land, or a carve of land, though it may contain pasture, meadow and wood; for it shall be presumed to have been all originally arable land, though afterwards converted into meadow, pasture or wood (2 Bac. Abr. 94); but a right of common appendant cannot be claimed in respect of land newly ploughed, and converted into arable land, out of the wastes and moors parcel of the manor. 5 Ass. 2; Roll. Abr. 397; 2 Bac. Abr. 94.

As a general rule, a person having a right to common appendant can only claim it for such cattle as are levant and couchant on his estate; that is, for such and so many as he has occasion for to plough and manure his land in proportion to the quantity thereof (*Bennett v. Reeve*, Willes, 227, 231); or perhaps, more accurately speaking, such cattle as the land will keep during the winter (*Ben-*

son v. Chester, 8 T. R. 396; *Cheesman v. Hardham*, 1 B. & Ald. 711. See also *Whitelock v. Hutchinson*, 2 M. & R. 205; *Scholes v. Hargreaves*, 5 T. R. 46, 48); but he cannot claim it for cattle which are merely borrowed, unless he make use of them all the year to plough or manure his land (Willes, 231; *Manneton v. Trevilian*, 2 Show. 328; *Skin*. 137; *Rumsey v. Rawson*, 1 Vent. 18, 25; T. Raym. 171); nor can he rent his right (22 Ass. pl. 84, and 11 H. 6, 22). The right, however, may by usage be limited to a certain number of cattle. 17 E. 3, 27, 34; Roll. Abr. 398 b.

There are, indeed, some cases in the old books which speak of common sans nombre, and which seem to imply that levancy and couchancy are only necessary in the case of common appurtenant, and not in the case of common appendant. But the notion of common sans nombre, in the latitude in which it was formerly understood, has been long since exploded, and it can have no rational meaning but in contradistinction to stinted common, where a man has a right only to put in a particular number of cattle. Per Willes, C. J., in *Bennett v. Reeve*, Willes, 232.

A man, therefore, having a right of common appendant for no more cattle than are levant and couchant on his land, no absurdity will follow let the land be divided ever so often into ever such small parcels, the owner of each parcel will be entitled *pro rata* to have an apportionment of the common. Ib. 231.

The right to common appendant may be limited to a certain period,

as for all the year, saving a certain time, in which the lord uses the land (27 E. 3, 86 b; Roll. Abr. 396), or from the time when the hay is carried off a meadow until Candlemas (17 E. 3, 26, 34; Roll. Abr. 397), or (according to an obsolete system of agriculture) for two years after the corn cut and carried away from a cornfield until it is resown, and every third year *per totum annum*. 22 Ass. 42; Roll. Abr. 397.

2. *Common of Pasture Appurtenant.*

Common of pasture appurtenant does not, like common appendant, owe its origin to common right or to a general privilege supposed to have been conferred by lords of manors upon tenants to whom they granted arable land; but it may commence at the present day and may be claimed from the grant of the owner of the land, or by prescription, which supposes a now forgotten grant. Burt. Compend. 354; *Sacheverill v. Porter*, Cro. Car. 482; *Cowlam v. Slack*, 15 East, 108; *Hayes v. Bridges*, Ridg. L. & S. 410; *O'Hare v. Fahy*, 10 Ir. C. L. Rep. (N. S.) 318.

Common appurtenant does not confine the right of depasturing on the land of another to such beasts only as are usually termed commonable, as horses, oxen, cows and sheep, for it may extend to beasts not commonable, as swine, goats and geese. Co. Litt. 122 a.

And this right is not necessarily appurtenant to arable land, but may be claimed in respect of any kind of land (*Sacheverill v. Porter*, Cro. Car. 482), and may be exercised

over a different lordship from that in which the waste is situated. Ib.

Where the commoner claims a general right, without any restriction as to number, to pasture cattle on the soil of another, the claim will be bad and cannot exist at law; for otherwise, to use the words of Lord Kenyon, a person "might collect as many cattle as he could from all parts of the kingdom, and stock them on one common." *Benson v. Chester*, 8 T. R. 396, 401.

The usual mode adopted, when a person makes such a claim, of admeasuring the common, that is to say, of ascertaining the number of cattle he may put thereon, is by showing the number of the cattle levant and couchant, on the land to which the right is appurtenant, during the winter. Noy, 30.

Hence levancy and couchancy must be proved by showing that the party claiming the right is in possession of some land whereon the cattle might be levant and couchant. *Scholes v. Hargreaves*, 5 T. R. 48; *Benson v. Chester*, 8 T. R. 396; *Ivatt v. Mann*, 4 Scott, N. R. 342.

A person may claim common appurtenant for a certain number of cattle, and in that case may put in those belonging to a stranger (2 Bac. Abr. 96), because no prejudice can arise to the owner of the soil, as the number is ascertained (*Richards v. Squibb*, 1 Ld. Raym. 726). The commoner need not, therefore, in such case aver that the cattle were levant and couchant. *Stevens v. Austin*, 2 Mod. 185; *Day v. Spooner*, Roll. Abr. 401, pl. 4; *Thornel v. Lassels*, Cro. Jac. 27.

The right of pasturage may be claimed over lammas lands, that

is, lands belonging to a person who is absolutely owner in fee simple, to all intents and purposes, for half the year, and the other half of the year he is still owner in fee simple, subject to the right of pasturage by other people. *Baylis v. Tyssen-Amhurst*, 6 Ch. D. 500, 507.

This right depends upon prescription, and is always appurtenant to, and claimed in respect of, the enjoyment of other lands, that is to say, there must be some connection between the beasts reared on those particular lands, and the number or the description of the beasts that may be depastured on the lammas lands; as, for instance, where the right claimed is for the beasts which plough the particular lands, or for every beast used thereon, not exceeding a particular number. *Ib.*

3. *Common of Pasture in Gross.*

Common in gross is so called, because it does not appertain to land, and must arise either from grant or by prescription. Co. Litt. 122 a.

Common in gross can only be claimed by persons who can take by grant; a claim, therefore, by the *inhabitants* of a place for all manner of beasts without alleging levancy and couchancy is bad (15 E. 4, 32 B. 33); but a corporation sole, as the parson of a church, or a lay corporation, may prescribe for a common in gross (*Mellor v. Spateman*, 1 Saund. 343; *Clarkson v. Woodhouse*, 5 T. R. 412, n.; and see *Beadsworth v. Torkington*, 1 Q. B. 782; *Johnson v. Barnes*, 7 L. R., C. P. 592; 8 L. R., C. P.

(Exch. C.) 527); but not, it seems, the king or lord of the manor. 27 H. 8, 10 B., Davys' Rep. 2.

Common in gross may be either for a certain number of cattle (Co. Litt. 122 a), or sans nombre; but by the latter term is meant not that the party claiming the right is entirely unrestricted as to number, as he can only claim to turn on the common so many cattle as it will maintain beyond the cattle levant and couchant on the lands of the lord and the commoners. The cases, however, upon the subject are contradictory. See 11 H. 6, 22 B; Co. Litt. 122 a; *Saye's Case*, March, 83; *Mellor v. Spateman*, Saund. 343; 22 Ass. pl. 36; 12 H. 8, 2; *Stables v. Mellor*, 2 Show. 43; 2 Lev. 246; Sir Thomas Jones, 115; *Stamford v. Bruges*, Shep. Abr. 381.

As to commons in royal forests, which may be either appendant, appurtenant, or in gross, see Woolrych on Commons, 105.

4. *Common pur Cause de Vicinage.*

This kind of common arises by prescription, where two commons adjoin each other, and the persons having a right of pasturage only over one of the commons allow their cattle indiscriminately to range over both. Co. Litt. 122 a.

This kind of common is not properly a right of common or profit à prendre, but is rather an excuse for a trespass (Co. Litt. 122 a; *Wells v. Percy*, 1 Bing. N. C. 566, 567; *Smith v. Baynard*, 3 Keb. 388); it will not justify a man putting his cattle originally in the common of vicinage, but they must escape from

his own. *Bromfeild v. Kirber*, 11 Mod. 72; *Commissioners of Sewers v. Glasse*, 19 L. R., Eq. 134.

It seems, moreover, that there cannot be a common of vicinage between more than two townships. *Commissioners of Sewers v. Glasse*, 19 L. R., Eq. 134, 160. And it has been laid down that if you have three vills, each of which has a common, A., B. and C., and vill B. lies between A. and C., vill B. may intercommon (that is, have common of vicinage) either with A. or C., but that A. cannot intercommon with C. *Ib.*

In common of vicinage there is a limitation of the right of this sort. Neither party can put on the common more beasts than his own common will maintain, so that if there were a vill with a large common, and a vill with a small common, the owner of the land in the vill with a small common could not put on the entire common more beasts than the small common could maintain. *Commissioners of Sewers v. Glasse*, 19 L. R., Eq. 161.

It seems that it is not essential to support a claim to a common pur cause de vicinage, that it should be between persons having rights of common property so called, or at least that there should be commoners on both sides; but that it may exist between two proprietors whose lands are not subject to common rights. See *Jones v. Robin*, 10 Q. B. 620, 632, 633, 635, and cases there cited.

A claim, however, of common pur cause de vicinage between two proprietors must be claimed by a plea of a grant or prescription and not of a custom. *Jones v. Robin*,

10 Q. B. 581, 620; *Clarke v. Tinker*, 10 Q. B. 604.

To establish a common pur cause de vicinage, an intercommoning between two districts must be alleged and proved. It is not enough to show that there was no fence between the two districts, and that cattle strayed from one to the other, but were constantly driven back by their respective owners, or turned off by the owners of the land into which they had strayed. *Clarke v. Tinker*, 10 Q. B. 604.

And common pur cause de vicinage cannot be set up as an excuse for cattle rambling from downs subject to common of pasture into downs of which the owner has exclusive possession, notwithstanding there be no fence or visible boundary separating the downs. *Heath v. Elliott*, 4 Bing. N. C. 388.

Although it is laid down in *Tyringham's Case*, that common by reason of vicinage ought to be claimed as an immemorial right, it is clear that since the statute 2 & 3 W. 4, c. 71, the right may be proved by showing thirty years' user. See *Priehard v. Powell*, 10 Q. B. 589, where to the observation that great inconvenience might follow, that the lord of one manor might make many grants, and purposely overstock his own common in order to eat up the grass of the adjoining one by cattle that will stray, Lord Denman, C. J., said—"If that were really done it might probably be held fraudulent; or, at all events, there was a remedy by inclosure." *Ib.* 603.

The owner of the soil of each of the commons may at any time, by making a sufficient fence between

them, put an end to this right of common for cause of vicinage. Co. Litt. 122 a; *Sir John Conway's Case*, Dyer, 316; *Wells v. Percy*, 1 Bing. N. C. 556; *Jones v. Robin*, 10 Q. B. 581, 620; *Prichard v. Powell*, Ib. 589.

But the common will continue until the separation be complete. *Gullett v. Lopes*, 13 East, 348.

There is another species of common in some counties, especially in Norfolk, which goes sometimes by the name of shack, where fields of arable land consist of the lands of many persons intermixed in many parcels, so that it is not possible that any of them can, without trespass to the others, feed their cattle in their own land, and, therefore, after the harvest, every one puts in his cattle to feed promiscuously in the open field. This species of common is very fully described in *Sir Miles Corbet's Case*, the leading authority upon the subject.

Where a common pur cause de vicinage, or common of shack, is claimed, the number of cattle must be limited in the first case to the number which the common, in the second to the number which the land, of the persons making the claim will maintain. *Termes de la Ley*, 80; *Prichard v. Powell*, 10 Q. B. 603; and see *Cheesman v. Hardham*, 1 B. & Ald. 711.

II. Common of Piscary.

Common of piscary is the right of fishing in waters on the soil of another person (8 Taunt. 187); it may be either appendant, appurtenant, or in gross (34 Ass. pl. 11). If a person claim to have a common of piscary or a free fishery, he can-

not exclude the owner of the soil (Co. Litt. 122 a); but if he claim to have a several fishery *separalem piscariam*, the owner of the soil shall not fish there (Ib. 122 a). As to the distinction between common of fishery, free fishery, and several fishery, see Co. Litt. 122 a; Butler's note 181; 1 Chitt. Game Laws, 239; *Hayes v. Bridges*, Ridg. L. & S. 390.

For recent decisions on the law relating to fisheries, see *Gammell v. Commissioners of Woods and Forests*, 3 Macq. Ho. L. Cas. 419; *Allen v. Donnelly*, 5 Ir. Ch. Rep. 229, 452; *Beauman v. Kinsella*, 8 Ir. C. L. Rep. (N. S.) 291; *Little v. Wingfield*, Ib. 279; *O'Neill v. Allen*, 9 Ir. C. L. Rep. (N. S.) 132; *Mannall v. Fisher*, 5 C. B. (N. S.) 856; *Malcomson v. O'Dea*, 8 Ir. C. L. Rep. 299; 10 Ho. L. Cas. 593; *Gann v. Free Fishers of Whitstable*, 13 C. B. (N. S.) 853; 11 Ho. L. Cas. 192; *Duke of Northumberland v. Houghton*, 5 L. R., Ex. 127; *Gore v. McDermott*, 1 Ir. R., C. L. 348; *O'Neill v. Maguire*, 1 Ir. R., C. L. 579; *Acheson v. Henry*, 7 Ir. R., C. L. 486; *Bloomfield v. Johnston*, 8 Ir. R., C. L. 68; *Irish Society v. Crommelin*, 2 Ir. R., C. L. 324.

III. Common of Estovers or Estouviers.

Common of estovers is the right of cutting wood from the forests or wastes of another (Bracton, 231), and herein it differs from estovers which a termor or tenant for life is entitled to, inasmuch as the latter takes them from the soil in which he himself has a limited interest. See ante, pp. 105, 106.

Under the term estovers is com-

prehended housebote, or wood for the purpose of repairs and fuel; ploughbote and cartbote, or wood for the repair of agricultural implements; and haybote, or wood for repairing fences. 1 Bulst. 94.

This right may be claimed either by prescription or grant, but (except in the case of copyholders) it cannot be claimed by custom; for, according to a well-known rule, a custom to take profits in alieno solo is bad. *Gateward's Case*, 6 Rep. 59; *Bean v. Bloom*, 3 Wils. 456; 2 Sir W. Black. 926; *Grimstead v. Marlowe*, 4 T. R. 717; *Selby v. Robinson*, 2 T. R. 758; *Hoskins v. Robins*, 1 Vent. 123, 163; 2 Saund. 320.

Estovers can only be taken according to the prescription or grant, whether it be at a fixed time (10 E. 4, 2, B; Brit. 153; *Russell and Broker's Case*, 2 Leon. 209; 3 Leon. 218), or by the view and delivery of the lord or the lord and bailiff (8 E. 3, 54); otherwise, although the party taking them may take less than he be entitled to, he may be treated as a trespasser.

Common of estovers may be either appendant, appurtenant, or in gross. Where it is claimed as appendant or appurtenant, it must be pleaded as belonging to some tenement. 11 H. 6, 11, B; 7 E. 4, 27; 10 E. 4, 3; 12 E. 4, 8.

It can only be claimed by prescription for an ancient house (F. N. B. 180; 4 Co. 86); but if it be pulled down, and another rebuilt instead, either in the same or another place, the prescription will not be lost. *Costard and Wingfield's Case*, Godb. 97; *Cowper v. Andrews*, Hob. 40.

A fortiori, mere alterations in a house will not destroy the prescription, but no greater profits must be taken *ab alieno solo* than the grant or prescription warrants. Thus, it is laid down that, "if a man has estovers either by grant or prescription to his house, although he alter the rooms and chambers of this house, as to make a parlour where it was the hall, or the hall where the parlour was, and the like alterations of the qualities, and not of the house itself, and without making new chimneys by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions will be destroyed, and although he build new chimneys, or make a new addition to his house, by that he shall not lose his prescription, but he cannot employ or spend any of his estovers in the new chimneys, or in the part newly added." *Luttrell's Case*, 4 Co. Rep. 87 a.

The estovers taken must be *reasonable*, and limited to the wants of the tenement in respect of which a man claims them, upon which therefore, they must be expended (7 E. 4, 27; 12 E. 4, 8; 8 Rep. 54), and cannot be sold to be used elsewhere (11 H. 6, 11 b, *Earl of Pembroke's Case*; Clayt. 47). Where, therefore, a person has common of estovers appurtenant to a house, and he grants to another the estovers reserving the house to himself, or grants the house to another reserving the estovers to himself; in either of those cases, the estovers shall not be severed from the house, because they must be spent in the house

(Plowd. 381; 3 Cruise, Dig. 30, 70). But it seems that where the quantity of estovers is certain, not only would a right to take them in gross by prescription be good, but if it were appurtenant to a tenement it might be severed from it. Co. Litt. 121 b.

It may here be mentioned, that in the case of *Arundel v. Steere*, Cro. Jac. 25, where a person prescribed to have estovers for repairing houses, or for building new houses on the land, it was alleged that the custom was unreasonable to take estovers for the building of new houses, but all the Court, except Williams, held it to be a good prescription, for one might grant such estovers at that day. Williams held the prescription bad upon the ground that such a claim ought only to be made for the repair of ancient houses. See also *White v. Coleman*, Freem. (Smirk's Ed.) 143.

A right in the inhabitants of a parish of lop-wood within a crown manor, that is, a right at certain periods of the year to lop for fuel the branches of trees growing upon the waste lands of the manor, cannot be created by custom or prescription, or otherwise than by crown grant or act of parliament (*Willingale v. Maitland*, 3 L. R., Eq. 103; *Chilton v. Corporation of London*, 7 Ch. D. 735); and a non-existent act of parliament will not be presumed as an origin for the alleged right (*Chilton v. Corporation of London*, 7 Ch. D. 735).

A grant by the crown of a *profit à prendre*, such as a right of lop-wood out of crown lands to the inhabitants of a parish, consti-

tutes the inhabitants a corporation *quoad* the grant (Ib.); and an action to establish any such right is maintainable only by the inhabitants as a corporation, and not by an individual inhabitant suing on his own behalf alone. *Chilton v. Corporation of London*, 7 Ch. D. 735; overruling on this point the case of *Willingale v. Maitland*, 3 L. R., Eq. 103, where the objection to an individual corporator suing does not appear to have been taken.

As to who are meant by "inhabitants" of a parish, see *Chilton v. Corporation of London*, 7 Ch. D. 735.

IV. *Common of Turbary.*

This kind of common is the right of digging turves upon the soil of another person. It may be either appendant or appurtenant to a house; but, as is laid down in *Tyrringham's Case*, it cannot be appendant to land, for turves would be only wanted in a house (5 Ass. 9; see also *Valentine v. Penny*, Noy, 145); and the right will pass under a grant of a house and its appurtenances. *Solme v. Bullock*, 3 Lev. 165; see also *O'Hare v. Fahy*, 10 Ir. C. L. Rep. (N. S.) 318.

Like, however, all other cases of a claim of right in *alieno solo*, in order to be valid, the right of common of turbary must be made with some limitation and restriction. It may be claimed as appendant to an ancient house within a manor, and by prescription or grant as appurtenant to any house out of a manor. Thus where a custom was pleaded that all the customary tenants of a manor having gardens, parcels of their customary tenements respec-

tively, had immemorially by themselves, their tenants and occupiers, dug, taken and carried away from a waste within the manor, to be used upon their said customary tenements, for the purpose of making and repairing grass-plots in the gardens, parcels of the same respectively, for the *improvement* thereof, such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used, at *all* times of the year, as often and in such quantity as occasion hath required: it was held by the Court of King's Bench, that the plea was bad in law, as being indefinite and uncertain, and destructive of the common: and so, it was held, was a plea of a similar custom for taking and applying such turf for the purpose of making and repairing the banks and mounds in, of and for the hedges and fences of such customary tenements. *Lady Wilson v. Willes*, 7 East, 121. So in *Valentine v. Penny*, Noy, 145, where trespass was brought for breaking a close and digging the soil; and the defendant justified that he and all whose estate he had in a cottage had common of turbary to dig and *sell ad libitum* as belonging to the house: the plea was held bad, as showing a right of common which was an interest and a freehold, and which as a prescription was repugnant in itself, because "a common appertaining to a house ought to be spent in the house, and not sold abroad." See also *Hayward v. Cannington*, 1 Lev. 232; *S. C.* Siderf. 354, nom. *Heyward v. Cannington*. As to a claim to take clay, see *Clayton v. Corby*, 2 Q. B.

813; 5 Q. B. 415. See also *Bailey v. Stevens*, 31 L. J. (C. P.) 226.

It seems that inhabitants cannot prescribe as such for common of turbary (2 Atk. 189; Freem. by Smirke, 136); but the mayor and burgesses of a borough may prescribe for common of turbary for themselves and the inhabitants, and by this means the inhabitants may get the benefit of the prescription (*White v. Coleman*, Freem. by Smirke, 134); and it seems a freeman of a town may have the right of common of turbary. *The King v. Warkworth*, 1 Mau. & Sel. 473.

With regard to the last three kinds of common it has been well observed by Serjeant Stephen that they "had all reference, no doubt, to the same object as common of pasture, viz. the maintenance and carrying on of husbandry; common of piscary being given for the sustenance of the tenant's family; common of turbary for his fuel; and estovers for repairing his house, his instruments of tillage, and the necessary fences of his grounds." 1 Steph. Com. 630.

V. *How Rights of Common may be acquired.*

In considering the different species of rights of common we have shown, to a considerable extent, how they may be acquired or evidenced, viz. either by grant, prescription or custom. With respect to rights of common acquired by grant it will be unnecessary to say anything further: with respect to rights of common claimed either by prescription or custom, as the terms,

although in early periods indiscriminately used, are by no means synonymous and lead to different results, it will be necessary to distinguish between them.

"In the common law," says Lord Coke, "*prescription*, which is *personal*, is for the most part applied to persons, being made in the name of a certain person, and of his ancestors, or of those whose estate he hath; or in bodies politic or corporate, and their predecessors; but a *custom* which is *local* is alleged in no person, but laid within some manor or other place." Co. Litt. 113 b. See also 6 Rep. 60; 8 Rep. 64 a. *In re Hainault Forest Act*, 1858, 9 C. B. (N. S.) 648; *Commissioners of the Sewers of the City of London v. Glasse*, 7 L. R., Ch. App. 456.

Although a *prescription* to take a profit (profit à prendre) in alieno solo, as, for instance, to work quarries, to carry away the soil, sand, or clay, as contradistinguished from a mere easement, may be valid, a *custom* to that effect, except in the case of copyholders (see *Gateward's Case*, 6 Co. 59 b; *Constable v. Nicholson*, 14 C. B. (N. S.) 230), or to search for and work mines under a local custom, as for instance such as exists in Cornwall (*Rogers v. Brenton*, 10 Q. B. 26), is clearly bad. *Blewett v. Tregonning*, 3 Ad. & Ell. 554; *Clayton v. Corby*, 5 Q. B. 415; *Attorney-General v. Matthias*, 4 K. & J. 579.

In the case of copyholders, there may be a custom *profit d prendre* from and out of the copyhold tenements of the manor in their own occupation, provided the custom be reasonable. The follow-

ing customs have been held *good*: a custom of a manor for the tenants to dig up the lord's soil for turf (*Dean and Chapter of Ely v. Warren*, 2 Atk. 189); a custom for copyhold tenants to dig for and get sand, sandstone, gravel and clay from their respective tenements, and to cart and carry away the same on to other lands, and to use or sell the same either on or off the manor, without licence from the lord (*Hammer v. Chance*, 4 De G., Jo. & Sm. 626); a custom for copyholders of inheritance without licence of the lord to break the surface and dig clay without limit from and out of their copyhold tenements, for the purpose of making it into bricks, to be sold off the manor (*Marquis of Salisbury v. Gladstone*, 9 Ho. L. Cas. 692). In the following cases alleged customs have been held *bad*, as being unreasonable, viz.: a custom to dig in mines near the foundations of the plaintiff's dwelling-house, so as to endanger it (*Hilton v. Lord Granville*, 5 Q. B. Rep. 701); a custom to cut and sell timber—elms growing on the copyhold (*Rockey v. Huggens*, Cro. Car. 220); a custom for a customary tenant of a manor which had coals under the freehold lands of other customary tenants, to get coals, leave them on the lands, not saying how long, and to take away in carts and waggons part, not saying how much, of such coals (*Broadbent v. Wilkes*, Willes, 360); a custom for all the customary tenants of a manor having gardens, parcels of their estates, to take pasturable turf at all times when necessary, and in unlimited quantity, from a waste within the manor, for making and repairing grass

plots in their gardens, for the improvement thereof, and for making and repairing the banks and mounds of the hedges and fences of the customary estates. *Wilson v. Willes*, 7 East, 121.

The cases which have been decided upon the right to *profits à prendre in alieno solo*, have no very close application to those cases which arise upon the validity of customs between the lord of a manor and his tenants; for, although in one sense the soil of the copyhold tenement is in the lord, this is true only in a qualified and limited degree, and does not imply complete ownership. The lord cannot, any more than the copyholder, work mines in the tenement, or cut down trees upon it, without a custom authorising him to do so. There is, however, a distinction between a custom applicable to the lord and one that is applicable to the tenant. The rights of the tenant could have been acquired only by grant or licence from the lord. The right of the lord over the copyhold tenement must have arisen from reservations for his own benefit, made by the absolute owner of the property, who had power to transfer it with such qualifications as he pleased. He might reserve to himself upon the original grant or licence, any right which would not be totally inconsistent and incompatible with the existence of the interest granted. . . . The cases show the extent to which customs, with respect to the soil of copyhold tenements, may be carried; and, although they do not define very distinctly the limits of reasonableness, yet they indicate the principle upon which the unreasonable-

ness of any custom may be ascertained. Per Lord Chelmsford, in *Marquis of Salisbury v. Gladstone*, 9 Ho. L. Cas. 708—710.

Before the passing of the Prescription Act (2 & 3 Will. 4, c. 71) the right to commons by prescription, like that of easements, could be defeated by showing that enjoyment commenced since the commencement of the reign of Richard the First. See note to *Sury v. Pigot*. By the Prescription Act (2 & 3 Will. 4, c. 71), after reciting that the expression, "time immemorial, or time whereof the memory of man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice: it is enacted, that no claim which may be lawfully made at the common law, by custom, prescription or grant, to any *right of common* or other profit or benefit to be taken and enjoyed from or upon any land, except such matters and things as are therein specially provided for, and, except tithes, rent, and services, shall, where such right, profit or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption for the full period of *thirty* years, be defeated or destroyed by showing only that such right, profit or benefit was first taken or enjoyed at any time prior to such period of *thirty* years, but never-

theless such claim may be defeated in any other way by which the same is now liable to be defeated: and when such right, profit or benefit shall have been so taken and enjoyed as aforesaid for the full period of *sixty* years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing. Sect. 1.

As to the cases in the Prescription Act relating to commons, see Sugd. Prop. Stat. 161, 2nd edit.; 1 Selw. N. P. 478, 12th edit.

VI. *The Incidents to Rights of Common, and herein of the respective Rights of the Lord and Commoners.*

As the lord is the owner of the soil of the common, subject to the rights of the commoners, he may, as a general rule, exercise all acts of ownership over the soil which do not injure their rights, such as planting trees or making fishponds, breeding game, digging clay for bricks, getting coal or other minerals, provided he does as little damage as possible. *Kirby v. Sadgrove*, 1 Bos. & Pul. 13; *Hassard v. Cantrell*, 1 Lutw. 107; *Coo v. Cauthorn*, 1 Keb. 390; 5 Vin. Abr. 7, 39, per Windham, J., in notis; *Hall v. Byron*, 4 Ch. D. 667, 675.

And the onus probandi on the question whether the lord unduly interferes with the right of common, lies on the tenant and not on the lord, as in the case of appropment. *Hall v. Byron*, 4 Ch. D. 667.

In the absence, however, of cus-

tom, the lord cannot do acts in derogation of his grant, such as cutting down trees or opening mines on the copyhold land. *Ib.* 676.

It is, however, perfectly well established that a custom is good which authorizes the lord to come on his copyhold land to open a shaft and work a mine; it may be destructive to the copyhold, but if the custom is proved, it is a good custom. So it is a good custom for the lord, after having granted land with the timber growing on it, to enter on the land and to cut down the timber. Per Lord Cottenham, C., in *Hilton v. The Earl of Granville*, Cr. & Ph. 293, 294. See also *Marquis of Salisbury v. Gladstone*, 9 H. L. Ca. 710.

In such cases the custom overrides the grant, and the grant is taken subject to the custom, so that there is nothing inconsistent, unless there be something unreasonable, and therefore illegal, in the custom. *Ib.*

It was, however, held in a case often commented on, that the right of the commoners in a common may be subservient to the right of the lord in the soil, so that the lord may dig clay-pits there or empower others to do so, *without leaving sufficient herbage for the commoners*, if such a right can be proved to have been always exercised by the lord. *Bateson v. Green*, 5 T. R. 411. But see the remarks on this case in *Hilton v. Earl Granville*, Cr. & Ph. 283, 293; and in *Hall v. Byron*, 4 Ch. D. 675, 676, 681, and the cases there cited.

What are termed "cattlegates"

give the owners no right to the possession of the soil, and the ownership of the soil remains in the lord of the manor, subject to the several right of pasture upon it by the cattlegate owners. It has consequently been held that the lord may maintain trespass against a cattlegate owner for sporting over it without his permission. *Rigg v. Earl Lonsdale*, 1 H. & N. 923; *S. C.*, 11 Exch. 654; see *Robinson v. Wray*, 1 L. R., C. P. 490.

The lord has likewise a right of common upon his own land; for, as observes Lord Coke, "If a man claim by prescription any manner of common in another's land, and that the owner of the land shall be excluded to have pasture, estovers or the like, this is a prescription or custom against the law, to exclude the owner of the soil, for it is against the nature of this word *common*, and it was implied in the first grant, that the owner of the soil should take his reasonable profit there, as it hath been adjudged." Co. Litt. 122 a.

But "a man may prescribe or allege a custom to have and enjoy, *solam vesturam terræ*, from such a day till such a day, and thereby the owner of the soil will be excluded from pasturing or feeding there; and so he may prescribe to have *separalem pasturam*, and exclude the owner of the soil from feeding there." Co. Litt. 122 a.

So likewise may the corporation of a borough. *Johnson v. Barnes*, 7 L. R., C. P. 592; 8 L. R., C. P. (Exch. C.) 527.

It was indeed doubted in *North v. Cox*, 1 Lev. 253, whether a party

could prescribe to take the sole and several herbage, but it was afterwards established as law by the cases of *Hoskins v. Robbins*, Pollexf. 13; *Potter v. North*, 1 Vent. 385; 1 Saund. 350; see also *Welcome v. Upton*, 6 Mees. & W. 536.

However, a separate right of feeding and folding, claimed on account of a manor farm, is not a claim of common, properly so called, but something reserved out of the original grant. 4 Scott, N. R. 356, per Tindal, C. J.

Right of the Lord to approve.

By the Statute of Merton (20 Hen. 3, c. 4, extended by 2nd Westminster, 13 Ed. 1, st. 1, c. 46, and 3 & 4 Ed. 6, c. 3), which appears to have confirmed the common law (2 Inst. 85; 3 T. R. 447), the lord of the manor, and it seems any owner of the soil, although not properly speaking the lord of the manor (*Glover v. Lane*, 3 T. R. 445; *Patrik v. Stubbs*, 9 Mees. & W. 830), may approve or inclose part of the common as against the commoners as against common of pasture, provided that he leave sufficient pasture for them, with free egress and regress from their tenements into the pasture (20 Hen. 3, c. 4), even if afterwards it becomes insufficient (2 Inst. 87); but the *onus* of proving that a sufficiency was left lies with the lord (*Arlett v. Ellis*, 7 B. & C. 463; *Lake v. Plaxton*, 10 Exch. 196; *Smith v. Earl Brownlow*, 9 L. R., Eq. 241; *Betts v. Thompson*, 6 L. R., Ch. App. 732), and upon his failing to do so, the Court of Chancery has restrained him from any further inclosure of

the waste. *The Commissioners of Sewers v. Glasse*, 19 L. R., Eq. 134.

But where the lord of a manor has appropriated by leasing, and also has granted out by copy of court roll portions of the waste, the fact that there has been a sufficiency of common of pasture during ten years is evidence that the inclosures have not interfered with the rights of the commoners. *Lascelles v. Lord Onslow*, 2 Q. B. D. 433.

As to the right of the lord to approve as against a right of "fold-course," see *Robinson v. Duleep Singh*, W. N., Aug. 3, 1878, p. 184.

A custom for the lord to inclose (*Arlett v. Ellis*, 7 B. & C. 346; 9 B. & C. 671), or to grant leases of the waste (*Badger v. Ford*, 3 B. & Ald. 153), without limit or restriction, is bad.

The Statute of Merton does not give the lord power to approve any kind of common, except common of pasture; it seems, therefore, that in the absence of a custom, the lord cannot approve against common of turbary or estovers. *Grant v. Gunner*, 1 Taunt. 435.

But a custom for the lord to approve as against common of turbary or estovers, provided he leaves a sufficiency for the commoners, will be valid (*Arlett v. Ellis*, 7 B. & C. 346, 370, 371; 9 B. & C. 671; *Lascelles v. Lord Onslow*, 2 Q. B. D. 433), not only as against copyholders, but also as against freeholders, where, in accordance with a custom of the manor, parcels of the waste were granted by the lord with the consent of a homage of the copyholders. *Lascelles v. Lord Onslow*, 2 Q. B. 433.

The lord of the manor or his grantee may inclose or approve part of a common against tenants having common of pasture, notwithstanding they have also some other right on the common, as common of turbary, common of estovers, common of piscary, or a right to dig sand, provided he leaves sufficient common of pasture (*Fawcett v. Strickland*, Willes, 57; Com. Rep. 578; *Shakespeare v. Peppin*, 6 T. R. 741); but if the approvement interfere with those other rights, the commoners may bring their action against the lord (6 T. R. 748). The Court of Chancery has assisted and protected the lord in making an approvement under the Statute of Merton. *Weeks v. Stacker*, 2 Vern. 301; *Arthington v. Fawkes*, Ib. 356; — *v. Palmer*, 5 Vin. Abr. 7.

As to what buildings the lord may erect on the waste by the Statute of Westminster 2, see *Neveill v. Hamerton*, 1 Sid. 79; 1 Lev. 62; 1 Keb. 283, 314; *Patrick v. Stubbs*, 9 M. & W. 830; but as that statute only applies to common of pasture, common of turbary or estovers must not be thereby injured. *Duberley v. Page*, 2 T. R. 391; *Shakespeare v. Peppin*, 6 T. R. 747.

Rights of Lord under various Statutes to convey.

The legislature has by various statutes enabled lords of manors to convey portions of waste or common land for different purposes; as, for instance, for her Majesty's dockyards or other naval purposes (6 & 7 Vict. c. 58, s. 36, repealed by 28 & 29 Vict. c. 112, s. 1); for the

purposes of a residence for the clergy (17 Geo. 3, c. 53, s. 21); for a church, churchyard or residence of a minister (51 Geo. 3, c. 115, s. 2); for the purposes of the Church Building Acts (58 Geo. 3, c. 45, s. 38); as sites for poor schools (6 & 7 Will. 4, c. 7, s. 1, repealed and in effect re-enacted by 4 & 5 Vict. c. 58, s. 36); and a gift by the lord under the last-mentioned act is valid, though the donor die within twelve calendar months from the execution thereof (7 & 8 Vict. c. 38); and for literary and scientific institutions (17 & 18 Vict. c. 112, s. 1).

With the consent of the lord of the manor and commoners waste or common land may be inclosed for the use of a poor house for incorporated parishes (22 Geo. 3, c. 83, repealed by Stat. Law Revision Act, 1871, 34 & 35 Vict. c. 116); and the overseers of the poor, with the consent of the lord of the manor and a majority of the commoners, may inclose not exceeding fifty acres from the waste for cultivation by the poor (1 & 2 Will. 4, c. 42, s. 2), and the powers of overseers under the last-mentioned and some other acts are, by 5 & 6 Will. 4, c. 69, s. 4, extended to guardians of the poor.

By 29 Geo. 2, c. 36, the lords and tenants may inclose part of the common for the purpose of planting and preserving trees fit for timber and underwood. By 31 Geo. 2, c. 41, these powers are declared to be vested in tenants for life, or years determinable on lives. 1 Selw. N.P. 472, 12th ed.

By the 2nd section of 51 Geo. 3, c. 115, power is given to the lord to make the grants therein autho-

rized "freed and absolutely discharged from all rights of common;" but this does not enable the lord to make grants overriding any customary rights other than rights of common and manorial rights of a like nature. See *Forbes v. Ecclesiastical Commissioners for England*, 15 L. R., Eq. 51. There the Ecclesiastical Commissioners, as lords of a manor in a parish, granted to the vicar of the parish, under 51 Geo. 2, c. 115, s. 2, part of the waste of the manor for a burial ground. In a bill filed on behalf of the parishioners setting up a customary right to this part of the waste as a village green, and seeking to set aside the grant, Sir J. Wickens, V.C., overruled the demurrer.

Where commons have been taken by a public company, as a railway company, for the purpose of their undertaking, and "any money shall have been paid to a committee under The Lands Clauses Consolidation Act, 1845," or under any railway or other special act, by which the money may have been directed to be paid to a committee as compensation for the extinction of commonable or other rights, or for lands, being common lands, or in the nature thereof, provisions are contained in 17 & 18 Vict. c. 97, for the apportionment of such compensation money. See sects. 15, 20. See also *Nash v. Coombs*, 6 L. R., Eq. 51. There every resident freeman of a borough had the right of annually turning into the Freemen's common (allotted under an inclosure act of 1795 to the Corporation, as trustees of the allotment, in lieu of certain rights of common of resi-

dent freemen) one head of stock, for a period fixed from time to time by the town council, subject to a payment annually fixed by the town council, for every head of stock so turned on. This right was transferable. A portion of the Freemen's common having been taken by a railway company, on a bill to obtain the direction of the Court as to the application of the purchase money, filed by the committee appointed under sect. 102 of the Lands Clauses Act, it was held by Sir W. Page Wood, V.C., that the present resident freemen were not entitled to have the corpus of the purchase money divided amongst them, but that the proper course would be to invest the money in land, to be held in trust for the freemen from time to time resident within the borough, and in the meantime that the money ought to be invested, and the dividends paid to such resident freemen, at the same time in each year as they had been accustomed to enter upon the enjoyment of their rights of common.

The mere occupiers of lands under copyholders of a manor, although under a bye-law entitled to certain rights of common over the lands of the manor, have been held not entitled to share in the purchase-money of part of the lands sold to a railway company. *Austin v. Amhurst*, 7 Ch. D. 689.

Remedies for Disturbances of Rights of Common.

A commoner may bring an action not only against the lord, but also against a commoner, or a stranger for a disturbance of the rights of com-

mon (*Hassard v. Cantrell*, 1 Lutw. 101; *Pindar v. Wadsworth*, 2 East, 154; *Beadsworth v. Torkington*, 1 Q. B. 782), and such action may be maintained although the amount of damage done to the plaintiff is small. Thus in *Pindar v. Wadsworth* (2 East, 154), it was held that a commoner might maintain an action on the case against a stranger for an injury done to the common by his taking away from thence the manure which was dropped on it by the cattle, and though the proportion of the damage was found by the jury only to amount to a farthing, it was held that the smallness of the damage was no ground for a nonsuit.

A freehold tenant of a manor on behalf of himself and the other freehold tenants (*Warrick v. Queen's College, Oxford*, 6 L. R., Ch. App. 716; 10 L. R., Eq. 105; *Hall v. Byron*, 4 Ch. D. 667), and a copyhold and freehold tenant on behalf of himself and all other copyhold and freehold tenants (*Smith v. Earl Brownlow*, 9 L. R., Eq. 241; *Hall v. Byron*, 4 Ch. D. 667), may commence an action for establishing rights of common over the wastes of a manor. See also *Earl of Dunraven v. Llewellyn*, 15 Q. B. 791; *Phillips v. Hudson*, 2 L. R., Ch. App. 243; *Betts v. Thompson*, 6 L. R., Ch. App. 732; and *Minet v. Morgan*, 11 L. R., Eq. 284; 6 L. R., Ch. App. 716, a case of common of pasture by reason of vicinage.

Although a bill has been held to lie against the lord by one copyholder on behalf of himself and other copyholders, being numerous, to have their rights of common as-

certained, it has been held that one commoner, not suing on behalf of all, could not maintain such a bill. *Phillips v. Hudson*, 2 L. R., Ch. App. 243.

As to production of documents by the lord of a manor upon a bill filed against him by a tenant, see *Warrick v. Queen's College*, 3 L. R., Eq. 683; *Hoare v. Wilson*, 4 L. R., Eq. 1; *Minet v. Morgan*, 11 L. R., Eq. 284.

Where a railway company, by virtue of their act, take possession under ss. 99—107 of the Lands Clauses Consolidation Act, of land over which there are rights of common, after payment to the lord of the manor of compensation in respect of his ownership in the soil, and a conveyance by him to the company, and they construct their railway on the land, without having first paid compensation to the commoners in respect of their rights of common, a commoner may maintain an action against the company for the disturbance of his rights of common. *Stoneham v. The London, Brighton and South Coast Railway Company*, 7 L. R., Q. B. 1.

If one commoner *surcharges* the common, that is to say, turns more cattle thereon than he is entitled to do, another commoner may maintain an action on the case (substituted for the old writ of admeasurement) against him. In an action for surcharging, it is not necessary for the plaintiff to show that he has lost his common, but only that he could not take the profits thereof so well as before (*Wells v. Watling*, 2 Black. 1233, 1235), and the plaintiff need not show that he was

exercising his right of common at the time of the surcharge (*Ib.*), and he may maintain his action although he may also have surcharged the common himself, for one tort cannot be set off against another. *Hobson v. Todd*, 4 T. R. 71, 74.

In short, as observed by Blackstone, J., any act that *lessens* the profit of the common will support an action against a commoner. *Wells v. Watling*, 2 Black. 1234.

Any act that *totally* destroys the herbage, as feeding a common with rabbits, will support an action against the lord. *Ib.*

In some cases a commoner may *abate* that which prevents his enjoyment of his commonable rights. "The lord, by his grant of common, gives everything incident to the enjoyment of it, as ingress and egress, and therefore authorizes the commoner to remove every obstruction to his cattle's grazing the grass which grows upon such a spot of ground, because every such obstruction is directly contrary to the terms of the grant. A hedge, or a gate, or a wall, to keep the commoner's cattle out, is inconsistent with a grant that gives them a right to come in." Per Lord Mansfield, C. J., in *Cooper v. Marshall*, 1 Burr. 265; see also *Sadgrove v. Kirby*, 6 T. R. 485; and *Arlett v. Ellis*, 7 B. & C. 346; where it was held, that under such circumstances the commoner may break down the whole of a fence put up by the lord; *S. C.*, 9 B. & C. 671.

The law, however, only allows the tenant to abate what he deems a nuisance when it prevents his enjoying the common at all, but he

will not be allowed to be judge in his own cause, "if he can get at the common and enjoy it to a certain extent, and his right be merely abridged by the act of the lord, in that case his remedy is by action against the lord, and he cannot assert his right by any act of his own" (per Lord Kenyon, C. J., 6 T. R. 485). Thus it has been held, where a lord had planted trees and turned out rabbits on the waste,—legal rights which as owner of the soil he might clearly exercise, provided he left a sufficiency of common for the commoners,—the commoner in such case cannot take upon himself to decide that the trees or rabbits on the common are a nuisance, and so cut down the trees or destroy the rabbits; but he is bound in the first instance to bring his action, and to establish to the satisfaction of a jury that they are a nuisance. Per Bayley, J., 7 B. & C. 363; and see *Sadgrove v. Kirby*, 6 T. R. 483; *Cooper v. Marshall*, 1 Burr. 259.

Where a house obstructs the exercise of a right of common, a commoner may, *after notice* and request to the occupier to remove the house, pull it down, though the occupier is actually inhabiting and present in the house (*Davies v. Williams*, 16 Q. B. 546). But it seems he will not be justified in doing so without giving notice. *Perry v. Fitzhove*, 8 Q. B. 757; *Jones v. Jones*, 1 H. & C. 1.

A commoner can distrain the cattle of a stranger damage feasant, because they are on the common without colour of a right. See

Hall v. Harding, 4 Burr. 2428; *Anon.* 3 Wils. 126.

But wherever there is a colour of right for putting on the cattle, a commoner cannot distrain, because it would be judging for himself in a question that ought to depend upon a more competent inquiry. Thus he cannot, in the case of a common appurtenant, distrain the cattle of another commoner damage feasant, upon the allegation that the owner of the cattle distrained had surcharged by putting on an excessive number of cattle (*Hall v. Harding*, 4 Burr. 2426); nor can he do so in the case of a common pur cause de vicinage. *Cape v. Scott*, 9 L. R., Q. B. 269.

Where the lord has no colour of right for putting his cattle on the common, as for instance, if there be a custom to exclude the lord totally during the commoners' season, a commoner may, it seems, distrain the lord's cattle as those of a stranger (*Trulock v. White*, 1 Ro. Abr. 405, 406; and see *Hall v. Harding*, 4 Burr. 2430, and the cases there cited). But if there be no such custom the lord's property in the soil would at least give him a colour for putting his cattle there; and though he over-charged the common, no cattle of the lord's could be deemed trespassers, or the lord a stranger on his own soil. The commoners therefore could have no authority in themselves to take an immediate and summary execution against the cattle of the lord, by distraining them damage feasant, as they might the cattle of a stranger who had no pretence or

colour of right. Per Lord Mansfield, C. J., in *Hall v. Harding*, 4 Burr. 2430. See 1 Wms. Saund. 122.

We have already sufficiently examined the rights of the commoners with respect to common of piscary, estovers and turbary.

With regard to their rights in the case of common of pasture, it must always be remembered that they have no interest in, and cannot meddle with, the soil, but have only a right to take the grass itself by the mouths of their cattle. Thus it has been held, that a commoner cannot make a trench or ditch on a common to let off the water unless authorized by custom (1 Roll. Abr. 406; 3 Cruise, Dig. 75). So likewise he cannot destroy or drive off the conies, or fill up their burrows. *Sir Jerome Horsey v. Hagberton*, Cro. Jac. 229; *Cooper v. Marshall*, 1 Burr. 259.

Where the lord of a manor conveys away part of the wastes to a third person, though the right of ownership of the soil changes hands, the right of common still subsists in the commoners, as well over that part of the wastes which the lord has conveyed away as over that part which he retains in his own hands. Per Lord Kenyon, C. J., 8 T. R. 401.

VII. *Alienation of Rights of Common.*

Commons appendant will pass by the conveyance of the land to which they are annexed without any general words describing them as appurtenances (*Solme v. Bullock*, 3 Lev. 165; *Sacheverill v. Porter*, Cro.

Car. 482; 2 Roll. Abr. 60); but they cannot be severed from the land by a separate conveyance without extinguishment. 1 Roll. Abr. 401.

The law is the same with regard to commons appurtenant. *Ib.* 402; *Drury v. Kent*, Cro. Jac. 14.

Where, however, the right of common is limited, as for a certain number of cattle, it may be conveyed by a deed severing it from its connexion with the land. *Ib.*; and see *Leniel v. Harslop*, 3 Keb. 66.

With regard to commons in gross, if the number of cattle is certain, they may be granted over by deed (*Hoskins v. Robins*, 2 Saund. 327); but not, it seems, if they are sans nombre. *Stampe v. Burgesse*, 2 Roll. Rep. 73. And see 1 Ld. Raym. 407; sed vide *Jones v. Richard*, 6 A. & E. 530.

VIII. *Extinguishment of Rights of Common.*

Rights of common may be extinguished in various ways:—1. By unity of possession; 2. By release; 3. By severance; 4. By the dissolution of the corporation to which they belong; 5. By alteration of dominant tenement; 6. By enfranchisement; 7. By inclosure.

1. Unity of possession of the land, subject to the right of common appendant or appurtenant, and of the right itself, will, as laid down in *Tyrringham's Case*, extinguish the right. See also *Bradshaw v. Eyre*, Cro. Eliz. 570; *Nelson's Case*, 3 Leon. 128. The title, however, to the land must be as high and

perdurable as that to the right. See ante, p. 125; *The King v. Hermitage*, Carth. 239; *Anon.*, Godb. 4.

Although the lord, being owner of the soil of the waste, cannot in strictness claim a right of common over it in respect of his demesnes, inasmuch as during the unity there would be a merger of that right, yet he has such an interest in respect of his estate as inclosure commissioners may well contemplate, and may lawfully assign to him a compensation for it in the shape of an allotment. *Arundell v. Lord Falmouth*, 2 Mau. & Selw. 440, 442; *Casamajor v. Strode*, 2 My. & K. 706; see also *Lloyd v. Earl Powis*, 4 Ell. & Bl. 485.

But shack common and common pur cause de vicinage are not destroyed by unity of possession. *Bishop of London's Case*, 1 Roll. Abr. 132; Woolrych on Commons, 132, 2nd ed.

2. Another mode of extinguishment is by release of the right by the commoner to the lord.

And a release of part of the land from the right of common will, it seems, operate as a release of the whole. (*Rotheram v. Green*, Cro. Eliz. 594; and see 8 T. R. 401; 1 Brownl. 180; 1 Show. 350; 3 Keb. 24.) Lord Kenyon, however, although he admitted that a release by one commoner of his right over a part of the common might possibly operate as a release of his right over the whole, intimated a strong expression of opinion that such result would not follow where all the commoners joined in the release, for if that were the conse-

quence of a release by all the commoners, there would long ago have been an end of commons throughout the kingdom. *Benson v. Chester*, 8 T. R. 401.

A right, however, of exclusive pasturage, as distinguished from a right of common, will not be extinguished by a release of part of the lands over which the right exists. See *Johnson v. Barnes*, 8 L. R., C. P. (Exch. C.) 527.

3. Common appendant or appurtenant for cattle levant and couchant may be extinguished by severance, as where the commoner conveys away the tenement to which the right is annexed, excepting the common. 1 Roll. Abr. 401; 4 Vin. Abr. 594, O, pl. 1, 2.

4. Where a corporation having a common in gross is dissolved, the right thereupon is extinguished. 27 Hen. 8, 10.

5. The question has been raised whether a right of common may be extinguished by an alteration of the dominant tenement. It has been decided in *Carr v. Lambert* (1 L. R., Ex. (Exch. C.) 168; 4 H. & C. 257; affirming *S. C.*, 3 H. & C. 499), that a right of common appurtenant for cattle levant and couchant, proved by acts of user for thirty years, and exercised in respect of a tenement formerly in a condition to support cattle, but now, and for more than thirty years past, turned to different purposes, is not extinguished or suspended by reason of such change in the condition of the tenement, if the tenement is still in such a state that it might easily be turned to the purpose of feeding cattle.

What would be the result if the character of the dominant tenement were so changed, that cattle might not be fed off its produce, for instance, if a town of a considerable extent had been built upon it, or if it were turned into a reservoir, has not been decided. *Carr v. Lambert*, 1 L. R., Ex. 175.

6. The right of common in the wastes of the lord of the manor is *at law* extinguished by enfranchisement—that is to say, by the conversion of copyhold into freehold tenure (*Fort v. Ward*, Mo. 667; Cro. Jac. 253, cited; *Barwick v. Matthews*, 5 Taunt. 375), unless it is preserved to the copyholder under terms equivalent to a re-grant of common (*Speaker v. Styant*, Comb. 127; *Worledg v. Kingswel*, Cro. Eliz. 794; *Doidge v. Carpenter*, 6 Mau. & Selw. 49; *Styant v. Staker*, 2 Vern. 250; *Fox v. Amhurst*, 20 L. R., Eq. 403). And it has been recently held that mere general words in a conveyance by the lord of a manor of (inter alia) a small parcel of land which had been copyhold, and was afterwards surrendered to extinguish the copyhold tenure, did not amount to a re-grant of rights of common. *Hall v. Byron*, 4 Ch. D. 667.

It may be here mentioned that copyhold lands may be enfranchised, *first*, by the lord either conveying the fee simple to the copyholder, or releasing to him the seignorial rights; *secondly*, by a commutation under the Copyhold Act, 1841 (4 & 5 Vict. c. 35; and see 6 & 7 Vict. c. 23; 7 & 8 Vict. c. 55, continued by 14 & 15 Vict. c. 53, extended by 15 & 16 Vict. c. 51, amended by

21 & 22 Vict. c. 94, continued by 21 & 22 Vict. c. 53, 23 & 24 Vict. c. 81, 25 & 26 Vict. c. 73, and 30 & 31 Vict. c. 143, amended by 31 & 32 Vict. c. 89, and continued by 39 & 40 Vict. c. 69), whereby the rents, fines, heriots, lord's rights in timber, and, if so expressly agreed, the rights in mines and minerals, may be commuted for an annual rentcharge and a small fixed nominal fine on death or alienation, or for a portion of land, or for any right to mines, or for any right to waste in lands belonging to the manor. *Thirdly*, by a voluntary enfranchisement under the same statute, which may be of all or any portions of the copyholds of the manor, and which may be either in consideration of a sum of money or of a rentcharge in fee, or of lands or mines, or of rights of common existing within the manor. *Fourthly*, by compulsory enfranchisement under the Copyhold Act of 1852 (15 & 16 Vict. c. 51, explained by 16 & 17 Vict. c. 57, and amended by 21 & 22 Vict. c. 94), whereby any lord or tenant, after any admittance to any lands after the 1st July, 1853, may require enfranchisement—if *at the instance of the tenant*, for a gross sum of money to be paid at once, or, with the consent of the Copyhold Commissioners, to remain as a mortgage charge for ten years at four per cent., or *if at the instance of the lord*, for an annual rentcharge. See 2 Davids. Prec. 305, note (a); Ib. 262, note (c).

By 21 & 22 Vict. c. 94, s. 10, an award of enfranchisement, confirmed by the Commissioners, is substituted

for a deed of enfranchisement under 15 & 16 Vict. c. 51.

All claims, moreover, to heriots due with respect to freehold or customary freehold lands may be extinguished. 21 & 22 Vict. c. 94.

After the confirmation of enfranchisement the customary modes of descent are to cease in favour of descent by common law, and, except as to persons married before the enfranchisement, the lands are to be liable to dower and curtesy applicable to lands in free and common socage, in substitution for customary dower, freebench, or curtesy. 4 & 5 Vict. c. 35, s. 79; 15 & 16 Vict. c. 51, s. 27.

And no tenant is to be deprived, under the Copyhold Acts, 1841 and 1852, of any commonable right to which he may be entitled in respect of the lands, but such right is to continue attached thereto, notwithstanding the same shall have become freehold (4 & 5 Vict. c. 35, s. 81; 15 & 16 Vict. c. 51, s. 45); and no enfranchisement is to affect the estate or right of any lord or tenant in any mines, minerals, or quarries within or under the land enfranchised, unless with their express consent in writing. 15 & 16 Vict. c. 51, s. 48; and see 21 & 22 Vict. c. 94, s. 14.

And nothing in 15 & 16 Vict. c. 51, contained is to interfere with, or prevent, or impede the enfranchisement of any lands whatsoever which may be enfranchised irrespective thereof, where parties competent to do so shall agree on such enfranchisement, or the exercise of any powers contained in any other acts of parliament. *Ib.* 55.

As to what is to be taken into

consideration in assessing the compensation payable to the lord, see *Lingwood v. Gyde*, 2 L. R., C. P. 72; *Arden v. Wilson*, 7 L. R., C. P. 535. The vendor of a copyhold estate enfranchised under 15 & 16 Vict. c. 51, is not bound to show the lord's title. *Kerr v. Pawson*, 25 Beav. 394.

Where a copyhold tenement is seized into the hands of the lord, it does not, therefore, lose its right of common; for that right is annexed to all customary tenements demised or demisable by copy of court roll; and while the estate remains in the lord it continues demisable. *Badger v. Ford*, per Abbott, C. J., 3 B. & Ald. 153, 155.

So where the lord has approved a part of a waste, and enfeoffs one who has common appendant, his right of common in the residue of the waste will not be thereby extinguished. *Dyer*, 339 a.

7. Another mode of extinguishing rights of common is by inclosure, which may take place—1. Where the lord himself, or owner of the waste, as we have already seen, incloses, or as it is more properly called approves, so much of the waste as he pleases, provided he leave sufficient for those entitled thereto, and upon the approvement taking place, the land taken by the lord ceases to be common, and the rights of the commoner with respect to it are thereupon extinguished. 2. Where a person without any title originally, by mere encroachment has taken part of the waste, he will, after holding it for twenty years, have acquired an absolute title to it, so as to extinguish all rights of

common thereupon. 8 & 9 Vict. c. 118, s. 52; and see 10 & 11 Vict. c. 111, s. 3.

If such encroachments are made by a tenant, although a contrary opinion was at one time entertained (*Doe d. Colclough v. Mulliner*, 1 Esp. 460), it is now clearly settled that a presumption arises, if they adjoin his farm, that they are made for the benefit of his landlord, or, more correctly speaking, for the purpose of adding to his holding (*Kingsmill v. Millard*, 11 Exch. 315), and it is immaterial whether such encroachment is made over land belonging to the landlord or a stranger (*Whitmore v. Humphries*, 7 L. R., C. P. 1, 4, 5), and that presumption will not be rebutted unless it appear by some act done at the time that the tenant intended to make the encroachments for his own benefit, and not to hold them as he held his farm (*Doe d. Lewis v. Rees*, 6 Car. & P. 610; *Doe d. Dunraven v. Williams*, 7 Car. & P. 332; *Andrews v. Hailes*, 2 Ell. & Bl. 349); and it seems now that it is not necessary that the land inclosed should be adjacent to the demised premises; the same rule prevails when the encroachments are at a distance (per Parke, B., in *Kingsmill v. Millard*, 11 Exch. 318); and the presumption will not be rebutted by the tenant showing a conveyance to his son; for, to use the expression of Alderson, B., "to give the conveyance that effect, it ought to have been an open act, which would have been inconsistent with such presumption." *Doe d. Lloyd v. Jones*, 16 L. J., N. S., Exch. 58, 61; *S. C.* 15 M. & W.

380. At any rate, it is enough if it be so near thereto that it may be presumed that his position as tenant enabled him to make the encroachment. (*The Earl of Lisburne v. Davies*, 1 L. R., C. P. 259.) Nor does the circumstance of the intervention of a small river and a fence, and a narrow strip of waste between the holding and the encroachment rebut the *prima facie* presumption, though there be no direct access between the two across the stream. *Ib.*

And an encroachment made by a copyhold tenant upon the waste of the manor becomes, at any rate in a manor in which there is a custom that the lord may grant portions of the waste as copyhold, an accretion to the original holding, and the tenant acquires by adverse possession, under the Statute of Limitations, only a copyhold title to the encroached land. *Attorney General v. Tomline*, 5 Ch. D. 750.

The presumption will not, however, prevail for the landlord's benefit against third persons. *Doe d. Baddeley v. Massey*, 17 Q. B. 373.

Although at the time of making an encroachment there is nothing to rebut the presumption that the tenant intended to hold it as a portion of his farm, yet circumstances may afterwards occur by which it may be severed from the farm; for instance, if the tenant conveys it to another person, and the conveyance is communicated to the landlord, then it can no longer be considered as part of the holding. But if the landlord is allowed to remain under the belief that the encroachment is part of the farm, the tenant is

estopped from denying it, and must render it up at the end of the term as part of the holding. *Kingsmill v. Millard*, 11 Exch. 313, 318, 319.

Where there are open pieces by the side of a public highway, the presumption is that they belong to the owner of the adjoining enclosed land between which and the highway the pieces lie.

But that presumption may be rebutted by evidence showing that they belong to the waste of the manor. *Gery v. Redman*, 1 Q. B. D. 161.

3. Inclosure may take place by agreement between all parties interested, viz. the owner of the soil and the parties claiming rights of common. This mode of procedure is in general impracticable, not only from the difficulty in getting a numerous body to give their assent, but also, because in general many have not, on account of infancy, coverture or otherwise, the power to give it. This has rendered the assistance of the legislature necessary.

4. Inclosures may take place by act of parliament. And this mode of inclosing commons, so frequent of late years, has rendered much less usual than formerly the rights of common possessed by tenants of manors over the lord's wastes. These inclosures were, until recently, effected by private acts of parliament, obtained for the purpose of each particular inclosure, subject to the provisions of the General Inclosure Act (41 Geo. 3, c. 109; and see also stats. 3 & 4 Will 4, c. 87; 3 & 4 Vict. c. 31), which contained general regulations

applicable to all. But by a recent act of parliament (stat. 8 & 9 Vict. c. 118, amended by stat. 9 & 10 Vict. c. 70, extended by 10 & 11 Vict. c. 111, further extended by 11 & 12 Vict. c. 99, and 12 & 13 Vict. c. 83, and continued by 14 & 15 Vict. c. 53, 21 & 22 Vict. c. 53, 23 & 24 Vict. c. 81, 25 & 26 Vict. c. 73, and 39 & 40 Vict. c. 69), commissioners have been appointed, styled the Inclosure Commissioners of England and Wales, under whose sanction inclosures may now be more readily effected, several local inclosures being comprised in one act.

Under the General Inclosure Act (41 Geo. 3, c. 109), s. 32, lands of a manor sold to a purchaser for the purpose of defraying the expenses of the act would be discharged from all common and other rights thereon and therein, and would be vested in him in fee simple, and held in severalty by him as his private and absolute property (*The Duke of Buccleuch v. Wakefield*, 4 L. R., Ho. Lo. 377). The 44th section, however, provides that the general act should be binding only so far as should not be otherwise provided by any special act; hence it has been held that under apt words in the special act, the lord of the manor may be entitled to the mines under the lands sold to pay the expenses of the act, and also to work such mines to an extent which might reach to the utter destruction of the land above, subject only to the liability to pay compensation for damage done. *The Duke of Buccleuch v. Wakefield*, 4 L. R., Ho. Lo. 377, partially reversing *S. C.* reported 4 Eq. 613.

See also the Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122); Metropolitan Commons Supplemental Act, 1871 (34 & 35 Vict. c. lvii.); *Hoare v. Metropolitan Board of Works*, 9 L. R., Q. B. 296.

As to the construction of provisoes, reserving to lords of manors in inclosure acts the rights of hunting, sporting or fishing, see *Ewart v. Graham*, 7 H. L. Ca. 331; *Bruce v. Helliwell*, 5 H. & N. 609; *Grand Union Canal Company v. Ashby*, 6 H. & N. 394; *Hedley v. Fenwick*, 3 H. & C. 349; *Robinson v. Wray*, 1 L. R., C. P. 490; *Lord Leconfield v. Dixon*, 2 L. R., Ex. 202; 3 L. R., Ex. (Exch. C.) 30; *Lloyd v. Lord Powis*, 4 Ell. & Bl. 485; *Sowerby v. Smith*, 8 L. R., C. P. 514; 9 L. R., C. P. (Exch. C.) 524; *Musgrave v. Forster*, 6 Q. B. 590.

It does not follow that because in an inclosure no right of access for the inhabitants of a district to go to an ancient well is reserved, that therefore the well or the right of the inhabitants to use it is extinguished. See *Race v. Ward*, 7 Ell. & Bl. 384, where it was decided, under the circumstances of the case, that the right to take water from a well by the inhabitants of a township was not extinguished by an inclosure under a special act and the general act then in force (41 Geo. 3, c. 109), neither the special act nor the award of the commissioners making any mention of the well or of any access to it, and the inhabitants having used the water of the well from time immemorial.

The rights of common possessed by owners of land in common fields,

however useful in ancient times, have been found greatly to interfere with the modern practice of husbandry, and accordingly 13 Geo. 3, c. 81, was passed, containing various provisions for their better cultivation, this was an inadequate remedy for the evil; and acts have been recently passed to facilitate the exchange (4 & 5 Will. 4, c. 30) and separate inclosure (6 & 7 Will. 4, c. 115, extended by 3 & 4 Vict. c. 31; see also 8 & 9 Vict. c. 118—as to the construction of this act see *Musgrave v. Inclosure Commissioners*, 9 L. R., Q. B. 162;—9 & 10 Vict. c. 70; 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 15 & 16 Vict. c. 79; 17 & 18 Vict. c. 97; 20 & 21 Vict. c. 31; 22 & 23 Vict. c. 43) of lands in such common fields. Under the provisions of these acts, each owner may now obtain a separate parcel of land, discharged from all rights of common belonging to any other person. Will. Real Prop. 293, 6th ed.

It may be here mentioned, that where lands, wastes of a manor, are allotted, either in pursuance of an agreement (*Paine v. Ryder*, 24 Beav. 151) or of the provisions of an inclosure act (*Doe d. Lowes v. Davidson*, 2 Mau. & Selw. 175), they do not become copyhold unless by express enactment (*Pochin v. Duncombe*, 1 H. & N. 842, 869) or contract.

See now the recent act of 22 & 23 Vict. c. 43, as to the reservation of mines, minerals, stone and other substrata reserved on any inclosure, and the provisions as to surface damages, how damages are to be

assessed, paid or levied. Sects. 1, 2, 3, 4, 5, 6.

Where part of common lands has been taken compulsorily under an act of parliament, the compensation money will be payable to the persons having common-rights in proportion to their interest in the lands if they had remained unsold. See *Fox v. Amhurst*, 20 L. R., Eq. 403, where it was held to be divisible among the copyhold tenants of the manor and the freeholders within the manor according to the stint fixed by the bye-laws of the homage.

But where every resident freeman of a borough had a right of turning on a common compulsorily taken, it was held that the purchase-money must be invested in land, to be held in trust for the freemen from time to time resident within the borough, and in the meantime that the money ought to be invested, and the dividends be paid to such

resident freemen at the same time in each year as they had been accustomed to enter upon the enjoyment of their rights of common. *Nash v. Coombs*, 6 L. R., Eq. 51.

Where commonable lands have been inclosed under an award made pursuant to a local statute, passed subsequently to 41 Geo. 3, c. 109, and by the award the soil of the roads running between the allotments, remains vested in the lord of the manor, if the land upon one side of a road becomes superfluous within the Lands Clauses Consolidation Act, 1845, s. 127, it will vest in the lord of the manor, for the right to the grass and herbage arising upon the road, under 41 Geo. 3, c. 109, s. 11, is insufficient to render the proprietor of the close upon the other side of the road an adjoining owner. *Hooper v. Bourne*, 3 Q. B. D. 259.

S U R Y v. P I G O T (a).



Int. Hill. 1 Car. Rot. 124.

[REPORTED POPH. 166.]

EASEMENTS.—*A. was possessed of a rectory, of which a curtilage was parcel. From time immemorial a watering place for cattle, &c., existed in the said curtilage, and a stream had flowed through a piece of land called the hopyard to fill the pond at the watering place. A. afterwards purchased the hopyard, and thus became possessed of the rectory and hopyard at the same time. He then sold the hopyard to B., under whose title the defendant entered and obstructed the watercourse by erecting a stone dam across it within the limits of the hopyard:—Held, that the right to the watercourse was not extinguished by the unity of possession, and that the plaintiff was entitled to recover for the obstruction.*

A watercourse having its origin ex jure naturæ, and not from grant or prescription, is not extinguished by unity of possession.

A right of way, however, having its origin either by grant or prescription, will be extinguished by unity of possession, unless it be a way of necessity, as a way to market or church.

Semble, a warren is not extinguished by unity of possession, because a man may have a warren on his own land.

If a person having a mill on part of his land, with a watercourse to it passing through another part of his land, sell the mill, he cannot stop the watercourse.

Where a man hath a house and ancient windows in it, and another person erect a new house and stop up the light, an action on the case will lie.

A. by prescription being bound to keep up a fence between his close and B.'s, purchases B.'s close, and permits them to be open without any

(a) *S. C. Noy*, 84; *Latch.* 153; *nom.* 339; *nom. Shury v. Piggott*, Sir W. Jones, *Surrey v. Piggott*, *Palmer*, 444; 3 *Bulst.* 145.

fence between them. On A.'s death, leaving two daughters who make a partition, one of the closes being allotted to each of them,—Semble, the prescription to keep up the fence is destroyed by unity of possession.

IN an action upon the case for stopping his watercourse, the plaintiff declares that, 14 Octob. 22 Jac., he was possessed of the rectory of M. in Berkshire, of which a curtilage was parcel, and that in this curtilage is, and hath been time out of mind, a watering place, for the watering of the cattle of the plaintiff and others, and for other necessary uses, and that a certain watercourse had, time out of mind, flowed from Milford stream to this curtilage, and that this water filled the said pond; and further, that the defendant, well knowing this, and intending to dam up the said watercourse, built a stone wall thereupon whereby the watercourse was stopped up, to the plaintiff's damage of 20*l.*, and this was laid with a continuendo. The defendant pleaded that, 3 Henry 8, the said Henry 8 was seised of the manor of, &c., and of the said rectory in his demesne as of fee, and of a certain piece of land called the hopyard, lying between the said watering place and the said stream, and by his letters-patent granted this to William Box and his heirs, by virtue whereof he was seised. Francis Searles entered upon him and was seised, and enfeoffed Pigot, 20 Jac., by virtue whereof he was seised, &c., and the three others justify as servants to Pigot, that they the said day and year filled up the said watercourse, as it was lawful for them to do; and that this is the same trespass, &c. The plaintiff demurs. And the question is, whether the unity of possession of all in Henry 8 hath extinguished the watercourse.

Dorrell, for the plaintiff, argued that if it were the case of a common it was clear that it was destroyed, because common ought to be in another man's land, but not in our case, for if one prescribe to have warren, if he purchase the land yet he shall have warren, 11 H. 7, 25. There are two houses, and the one prescribes that the other shall mend the gutter, and afterwards they come to the hands of one man, and then he alien one of them, this unity shall destroy the mending of the gutter.

Bear, for the defendant, argued that the unity hath destroyed the custom, 21 E. 3, 2. A way is but an easement, yet by the purchase of the land the way is extinguished; and also the watercourse is not only an easement but a profit à prendre; and he cited *Dyer*, 295, b. 19, in case of an inclosure, that the inclosure is extinguished, but there is made a quære; and he cited 38 Eliz. in C. B., an opinion that by purchase of a close the inclosure is extinguished; à fortiori here because it is a profit. And for the case of 11 H. 7, 25, it is by the custom of London; but there is no custom in our case, and the case of a warren is not like to our case, because a man may have warren in his own soil.

Barksdale, for the plaintiff, in Michaelmas Term next, argued that the unity of possession in H. 8 had not extinguished the watercourse, and that the *terminus ad quem* and the *medium* also being in one, had not extinguished nor destroyed it. And *benedicta est expositio quando res redimitur a destructione* (4 Co. 26). The law will not destroy things, but the law will sometimes suffer a fiction (which is nothing in *rerum naturâ*) *ut res magis valeat quam pereat*. I confess that profit à prendre as common or rent is extinguished by unity of possession; for common it appeareth in 4 E. 3, 45, 46, and in *Tyringham's Case*, 4 Co. 36 b (ante, p. 102); and for rent it appeareth in 4 H. 4, 7; and in 21 E. 3, 2, it appeareth that a way is extinguished by unity of possession, 3 H. 6, 31, *Brooke*, *Nusans*, 11; for it is repugnant for a man to have a way upon his own land. But I conceive that our case differs from the case of a way, and for this reason, that where the thing hath a being and existence, notwithstanding the unity, there it is not destroyed by the unity, but the watercourse hath a being notwithstanding the unity, ergo, &c. I will prove the major proposition by these cases:—35 H. 6, 55, 56, Where a warren is not extinct by a feoffment of the land, for I may hawk and hunt on my own land as on another man's, so the warren hath existence notwithstanding the unity. *Dyer*, 326, Where the Queen was seised of *Waddon Chase*, and the Lord *Gray* was lieutenant there in fee, and he and his ancestors and their keepers had by prescription used to hunt wandering deer in the demesnes of the manor of S. adjoining as in purlieus. The manor of S. comes into the Queen's hands, who

grants this to Fortescue in fee, with free warren within the demesnes, &c.: it was holden that the unity doth not extinguish the purlieu. Dyer, 295, Two closes adjoin, the one by prescription is bound to keep up a fence, the owner of one purchases the other, and suffers the hedges to decay, and dies, leaving two daughters his heirs, who make partition: quære, whether the prescription for the inclosure be revived; true it is that it is made a quære, but he saith, see the like case, 11 Hen. 7, 25, of a gutter which proves our case, as I will show afterwards.

For the minor proposition that, the watercourse hath being, notwithstanding the said unity, I will prove it by 12 Hen. 7, 4; a præcipe quod reddat of land aquâ co-operta. Mich. 6 Jac., *Challenor and Moore's Case*, an ejectione firmæ was brought of a watercourse, and it was there resolved that it does not lie, because it is not *firma*, sed *currit*; but of *terra aquâ co-operta* it doth lie. Also I will take some exceptions to the bar. 1. There is no title in the bar for the defendant Pigot, and so we being in possession, albeit in truth we have no title, yet he who hath no title cannot oust us, neither can stop the said watercourse, and it is only shown in the bar that Searles entered and enfeoffed Pigot, but for anything that yet appears, the true owner continued in possession. 21 Jac. C. B., *Cook against Cook* in a writ of dower, the defendant pleads an entry after the darrein continuance, and doth not plead that he ousted him, and upon this the plaintiff demurs; and it is there adjudged that it is no plea in bar, because he doth not say, that the defendant entered and ousted the tenant. 2. Exception, the action is brought against four, scil. Pigot, Cole, Branch and Elyman; and Pigot hath conveyed a title from Searles, the three other defendants justify; but Pigot doth not say anything but that Searles enfeoffed him. 7 Hen. 6, an action of waste is brought against many, one answers, and the other not, this is a discontinuance. And for the principal matter, I will conclude with 11 Hen. 7, 25; Bro. Extinguishment, 60, two have tenements adjoining, and the one hath a gutter in the other's land, and afterwards one purchases both, and then he aliens one to one, and another to another, the gutter is revived notwithstanding the unity, because it is very necessary, and so he prayed judgment for the plaintiff.

Bear, for the defendant.—I, in a manner, agree with all the cases

which have been put on the other side; and I conceive that the watercourse is not *stagnum* but *servitium*, which is due from the one land to the other. It is but a liberty, and therefore I agree with *Challenor's Case*, which is but a liberty, that an *ejectione firmæ* doth not lie of it, but *ejectione firmæ* lies *de stagno*.

For the first exception I answer and confess, that to allege an entry after the darrein continuance, without alleging an ouster of the tenant, cannot abate the writ, for the defendant may enter to another intent as appeareth in the Commentaries, and with the assent of the tenant; but here it was alleged, that a feoffment was made, and a livery which implies another.

For the matter in law, I conceive that the watercourse is extinguished, and it may be compared to 21 E. 3. 2. The case of a way which is extinguished by unity of possession, *Hemdon and Crouche's Case*, Hill. 36 Eliz. Rot. 1332. Two were seised of two several acres of land, of which the one ought to inclose against the other, one purchases them both, and lets them to several men, and there the opinion was, and it was adjudged accordingly, that the inclosure is not revived, but remains extinguished. In *Harrington's Case*, 39 Eliz., the same thing was resolved; and albeit in *Dyer*, 295, is a quære, yet the better opinion hath been taken according to these resolutions. In *Jordan and Atwood's Case*, Owen, 121, when one had a way from one acre to another, and afterwards purchased the acre upon which he had the way, and afterwards sold it, in that case the opinion of three justices was, that the way was extinguished. Also, 11 H. 4, 50, and 11 H. 7, 25, prove this case, for the said case is compared to the custom of Gavelkind and Burrough English, and there the quære is made whether by the custom it be revived, and if it be a custom which runs with the land, the unity of possession doth not extinguish it. Common appendant is destroyed by unity of possession, and yet it is a thing of common right, *Tyrringham's Case*, 4 Co. 36 b, and 24 E. 3, 2; but a watercourse being a thing against common right, *à fortiori* it shall be extinguished. Now I will take some exceptions to the declaration.

1. Because he hath laid a prescription for a watercourse, as to say, that it was belonging to a rectory, to which, &c., and this is a good exception as appears by *Iseham's Case*, 6 Eliz., 6 *Dyer*, 70 (b), where

(b) *Withers v. Iseham*.

exception was taken, that before his prescription he doth not say that it was *antiquum parcum*, which exception (as it is there said) was the principal cause that judgment was given against him; and also, as the case is here, it ought to be a rectory inappropriate, and this cannot be before the time of H. 8, which is within time of memory, for before the said time no lay person could have a rectory inappropriate, and therefore I pray judgment for the defendant.

Barksedale said, the prescription was well laid, and he would prove that by 39 H. 6, 32, and 33 H. 6, 26.

Per Curiam.—The prescription is good enough, and albeit it is not said, that it is *antiqua rectoria*, yet it is well enough, Mich. 1 Car. at Reading Term, in *Brock and Harris's Case*, he doth not say that it was *antiquum messuagium*, and yet it was resolved good.

Doddridge, J.—The case of 6 E. 6, differs in this point from this case, for a rectory shall always be intended ancient, and so is not a park, for it may be newly created. And he put this case; suppose I have a mill, and I have a watercourse to this in my own land, and I sell the land, I cannot stop the watercourse.

Crew, C. J., seemed of opinion that the prescription was gone, and that the better opinion in *Dyer*, 295, 13 Eliz., had always been, that the inclosure is gone by unity of possession, but yet the watercourse is matter of necessity.

Doddridge and Whitlocke, JJ.—The way is matter of election, but the course of water is natural.

Jones, J.—There is great difference between a way and a watercourse as to this purpose; for admit that this watercourse, after that it had been in the curtilage of the plaintiff, goes further to the curtilage of another, shall not that other have the benefit of this watercourse, notwithstanding the unity of possession? I think clearly that he shall.

Doddridge, J.—My opinion is, that the watercourse is not extin-

guished by the unity of possession. [But some conceived that he had declared his opinion in terror to the defendant.]

Barksedale, afterwards the same term, for the plaintiff, said, that he had argued the case before, and therefore would now only endeavour to answer some exceptions which had been taken to the declaration. 1. Exception hath been that no prescription or custom is made for this watercourse, but only that *currere solebat et consuevit*. But I conceive that the declaration is good notwithstanding this, because the plaintiff here doth not claim an interest in the watercourse, but in the land in which, &c., and therefore it is good, and this appeareth by 12 E. 4, 9, the *Prior of Lantony's Case*, in a prescription in a market overt generally, and the reason there was, because he was a stranger, as in our case he is, and this pleading appeareth also to be good by Coke's Book of Entries, 18, *Smyth's Case*, which was entered 9 Jac. Rot. 366, in this Court. 2. Exception was, because it is not said, that it was *antiqua rectoria*. 3. Exception, because it doth not appear that he was a spiritual man to whom the demise of the rectory was made. 4. Because it is not said that the watercourse *ad predict. rectoriam pertinet*. 5. Because the watercourse is alleged to be for his customary tenants of the said rectory, and this is not good, as appeareth by 21 Eliz., Dyer, 363. Prescription *pro quolibet customar. tenente* is not good, but I conceive that this is not our case, for here is *customarius tenens rectorie*, and there it is agreed that *quilibet customarius tenens maner.* had been good. And the plea in bar hath salved these objections, and therefore he prayed judgment for the plaintiff.

Jeremy, for the defendant.—And first for the matter in law, it seemed to him that by the unity of possession the watercourse is extinguished, and the watercourse may well be compared to the case of the way, for as a way is a passage for men over the land, so water hath passage upon the land, and a way is extinguished by unity, as appeareth by 21 E. 3, 2; 11 H. 4, 5; 21 Ass. and Davys's Reports, 5; and in 4 Jac. *Jordan and Atwood's Case*, Owen, 121, it was the better opinion, that a way was extinguished by unity of possession; true it is, that there Popham, C. J., put the difference, where the way is of necessity and where not; for where the way is of necessity, there

it shall not be extinguished. This case hath been compared to the case of a warren in 35 H. 6, 55; but I conceive that the cases are not alike, because a warren is a mere liberty, 8 H. 7, 5. A man may have a warren in his own land, and *Butt's Case*, 7 Co. 23 a, by a feoffment of land a warren doth not pass: but this watercourse hath its original out of the land, and this case cannot be compared to an ancient watercourse running to a mill, for notwithstanding the unity it shall pass with the mill, for otherwise it shall not be molendinum aquatinum, so that the water there is parcel of the thing, and so of necessity ought to pass with the thing; but here it doth not appear that it is a watercourse of necessity, and for anything that appeareth, it may be filled with another watercourse. Also I conceive that the declaration is not good:—1. Because neither prescription nor custom is laid for the watercourse, and it appeareth in Co. Book of Entries, *Holcome and Evans's Case*, and the old Book of Entries, 616, 617, Mich. 1 Car. Rot. 107, *Turner and Dennie's Case*, in this Court, in trespass for breaking his close, &c., the defendant justified for a way, &c., and that he was possessed for years, and for him and his occupiers had a way over the land, the plaintiff demurred and it was resolved, that the prescription was not good. 2. The declaration is insufficient, being an action upon the case for the stopping of a watercourse, and it is not vi et armis, nor contra pacem, the *Earl of Shrewsbury's Case*, 9 Co. 50; when there are two causes of an action upon the case, the one causa causans, the other causa causata, causa causans may be alleged vi et armis, for this is not the immediate cause of the action, but causa causata, F. N. B. 86, 12 H. 4, 3, 8 R. 2, and 29 E. 3, 18 b, in the end of the writ of action upon the case, shall be contra pacem. 3. Also he hath prescribed for the tenants of the rectory, which is not possible, for no layman could be tenant of a rectory, or of tithes, before the statute of H. 8, and therefore I pray judgment for the defendant.

Whitlocke, C. J.—I conceive that the declaration is good, and the bar naught, both for the form and matter. The question here is of aqua profluens, and I conceive that there needs no prescription or custom in this case, for water hath its natural course; and, as is observed by Brudnell in 12 H. 8, *naturâ suâ descendit* (c), it may be

(c) See *Wood v. Wand*, 3 Exch. 775.

called *usu-captio* or usage, and I conceive that the action upon the case very well lies in this case, like to the case where a man hath a house and windows in it, and another erects a new house and stops the light, then he may have an action upon the case; but true it is that he shall not only count for the loss of the air, but also he ought to prescribe that time out of mind light had entered by these windows, &c., see 7 E. 3 (d). If there be a schoolmaster in a town, and another erect a new school in the same town, an action upon the case doth not lie against him, because schools are for the public benefit, and every private man may have a school in his house. And for the exception, that a layman cannot be possessed of a rectory, I conceive that the declaration is good notwithstanding, for a layman may have a rectory by demise.

And for the plea in bar, it is not good for the form, because that Searles entered and encoffed Pigot, and it is not said that he entered and expulit; and if a man enter and make a feoffment, the owner being upon the land, the feoffment is void, and therefore an actual ouster ought to be shown. And for the matter in law, I conceive that the bar is not good, for by the unity of possession the watercourse is not extinguished, and yet I agree with the cases of a way and common upon the differences of rights which are put in Bracton, lib. 4, 221. These are called *servitutes*, as *jus eundi, fodiendi, hauriendi, &c.*, *sunt servitutes quas prædia ex quibus exeunt aliis prædiis debent*, and are called *servitutes prædiales*, and this began by private right, to wit, by grant or prescription.

A way or common shall be extinguished, because they are part of the profits of the land, and the same law is of fishings also; but in our case the watercourse doth not begin by the consent of parties, nor by prescription, but *ex jure naturæ*, and therefore shall not be extinguished by unity. A warren is not extinguished by unity, because a man may have a warren in his own land; and in the case of 11 H. 7, 25, the gutter was not extinguished only by the unity of possession, but there also appeareth in the case that the pipes were destroyed, whereby it could not be revived; and although in the book of the 13 Eliz., Dyer, 295 (e), where two closes adjoin together, the one being by prescription bound to keep up a fence, and the

(d) See *Angus v. Dalton*, 3 Q. B. D. 105.

(e) See *Boyle v Tamlyn*, 6 B. & A. 337.

owner of the one purchase the other, and dies, leaving issue two daughters who make partition, it is a quære whether the inclosure be revived, yet I conceive clearly, that by unity of the possession the inclosure is destroyed, for fencing is not natural, but comes by industry of men, and therefore by the unity it shall be gone; and so briefly, with this diversity he concluded that where the thing hath its being by prescription, unity will extinguish it; but where the thing hath its being *ex jure naturæ*, it shall not be extinguished, and therefore the plaintiff ought to have judgment.

Jones, J.—I agree that the declaration is good, and that the bar also is good in manner, but for the matter in law it is not good.

As to the first exception to the declaration, I conceive it is good, albeit there wants a prescription, and this is the ordinary of pleading, as appears in *Luttrel's Case*, 4 Co. 86, and in all the precedents before cited.

2. For the exception *vi et armis*, I conceive there is this difference, where the act is a trespass and a nuisance, there it may be laid to be *vi et armis*; but if it be a nuisance only, and not a trespass, it is otherwise: as if I have a way over another man's land, if a stranger dig in the land so that I cannot have the way, now because it is a trespass to the owner of the soil, in my action upon the case against a stranger I may have *vi et armis*; but if the owner stop the way, there *vi et armis* shall not be in my action upon the case.

For the third exception, because he doth not say *ad rectoriam spectandam* (*f*), but I conceive that it shall be intended *ad rectoriam impropriat.* and so it appeareth.

4. Where it is said watercourse for his tenants, I conceive it is good enough, being in an action upon the case where damages only are to be recovered. The bar also is good in form; for although the tenant here be a disseisor, yet it is a good bar, for it matters not whether he hath a title or not, if the watercourse be extinct by the unity. For the matter in law, I conceive that the unity of possession has not extinguished the watercourse. A man hath things out of another man's land, either by grant as a seignior, rent, common, &c., and these are extinguished by unity, &c.; and the reason is, because one who hath interest as owner of the land cannot have a particular

(*f*) Qy. antiquam.

interest in the same land also. Or by prescription, and those things are extinguished by unity of possession also, and not only for the first reason, because he is owner of the land and so cannot have a particular interest in the same land also, but also because that by the unity the prescription fails. And for the case in Dyer, 295, 13 Eliz., I conceive that by the unity the inclosure is gone, and so it was resolved in 37 Eliz., for every one is not bound to inclose. For the case of the way, I will suspend my opinion concerning it, because *Clark and Lamb's Case* is now depending, touching it in the same point.

But now for our case; it differs from the other cases, for the prescription here is in another manner than is made for common, for it shall be pleaded either as appendant or appurtenant; but *currere solebat* is only in this pleading, for here no interest is claimed, but in the other cases an interest is claimed. In this case the land remains as it was before, and therefore the unity will not extinguish it; and if such a unity by construction of law should extinguish watercourses, it would be too dangerous: for suppose a man hath a watercourse from the Thames to his house in Lambeth, if he purchase a parcel of land in Henley; now, because that the Thames comes by the same land, shall his watercourse be extinguished? Also suppose that the watercourse, after it hath been in the curtilage of the plaintiff, goes into another curtilage, is it reason that by this unity the second man shall lose his watercourse? Without doubt it is unreasonable. And the case of 11 H. 7, 25, of the gutter, warrants this opinion, and therefore the plaintiff ought to have judgment.

Doddridge, J.—I conceive no great difficulty in the case; for the exceptions to the declarations they are not material.

1. That there wants prescription or custom. I conceive that it is good enough, for here are the words of *currere solebat et consuevit*, and *consuevit* is a good word for a custom.

2. That a layman cannot have a parsonage. True it is, that a layman cannot be a parson, but he may have a parsonage, for he may be lessee of it, which appeareth many times in our books.

3. That it is not alleged to be *vi et armis*. This is the most colourable exception, and the case and rule cited out of *The Earl of Shrewsbury's Case*, 9 Co. 50, is good law; but it is impossible to plead *vi et armis* in this case, for the unity was in H. 8, and the wrong is sup-

posed after the severance, and it is supposed to be done by the owner of the land, and a man cannot do a thing upon his own land *vi et armis*.

4. Because it is not alleged to be an ancient rectory. I conceive it need not, because the law presumes all rectories to be ancient, the patronages whereof are gained *ratione fundi, foundationis, vel dotationis*.

5. Because he doth not say that *pertinet ad rectoriam*. But he hath said a thing which amounts to as much; for it is said, that in the rectory was a certain curtilage in which there is a watering pond, and the curtilage is part of the house; and, therefore, he need not say that it belongs to the house. For the bar, I conceive that it is good for the manner. A man makes a feoffment of land, the owner of the land being present at the same time, nothing works by the livery, for the reason before given by Jones, J. For the matter of law, I conceive that the unity of possession doth not extinguish the watercourse, and that for two reasons:

1. For the necessity of the thing.

2. From the nature of the thing being a watercourse, which is a thing running.

1. For the necessity; and this is the reason that common appendant, by the unity of possession, shall not be extinguished, for it is appendant to ancient land hide, and gain arable land, which is necessary for the preservation of the commonwealth; and as in this case there is a necessity of bread, so in our case there is a necessity of water. And for the case of a way *distinguendum est*; for if it be a way which is only for easement, it is extinguished by unity of possession; but if it be a way of necessity, as a way to market or church, there it is not extinguished by unity of possession; and accordingly was the opinion of Popham, C. J. (*g*), which I take for good law; and the case of 11 H. 7, 25, is a notable case, and there a reason is given why a gutter is not extinguished by unity of possession, because it is a matter of necessity.

2. From the nature of water, which naturally descends, it is always current, *et aut invenit aut facit viam*; and shall such a thing be extinguished which hath its being from the creation? *Luttrell's Case*, 4 Co. 86, a mill is a necessary thing, and if I purchase the land upon which the stream goes which runs to this mill, and afterwards I alien

(*g*) In *Lady Brown's Case*, cited more fully Palm. 446.

the mill, the watercourse remains. So if a man hath a dyehouse, and there is water running to it, and afterwards he purchase the land upon which the water is current and sell it, yet he shall have the watercourse, Dyer. *Dame Brown's Case*, and the principal case in *Luttrell's Case*, a fulling-mill made a water-mill, this shall not alter the nature of the mill, but yet it remains a mill; so the water hath its course notwithstanding the unity. And he concluded for the plaintiff.

Crewe, C. J.—I agree that the declaration is good, and also that the bar is good for the manner; but for the matter in law, I conceive that it is not good. In our law every case hath its stand or fall from a particular reason or circumstance. For a warren and tithes, they are not extinguished by unity, because they are things collateral to the land. And for the case of 13 Eliz. in Dyer, 295, of an inclosure, I conceive that by the unity the inclosure was destroyed, for the prescription was interrupted, and in *Day and Drake's Case*, 3 Jac., in this Court it was adjudged that in the same case the prescription was gone. It may be resembled to the case of *Homage Ancestrell*, 57 E. 3, *Fitzherbert*, *Nusans*. And for our case, it is not like to the cases of common or a way, because the watercourse is a thing natural, and therefore by unity it shall not be discharged; also there is a lineament (*h*) out of which every man shall have a benefit; and therefore he concluded that judgment should be given for the plaintiff. And judgment was commanded to be entered for the plaintiff.

Sury v. Pigot, a case found in so many Reports, is a leading authority on the law of Easements. "The case," says Mr. Justice Story, "is most fully reported in *Popham*; it is also reported in *Noy*, 84; *Palmer*, 444; *William Jones*, 145; and 3 *Bulst.* 339; but without any essential difference. It does not appear to me that there is any difficulty in admitting its entire correctness. It

proceeds upon this plain principle, that a privilege which was annexed to, and in actual use with the rectory during the unity of possession, and was not parcel of the other land, or a profit à prendre out of that land, was to be considered as still existing as an appurtenance or privilege annexed to the rectory, notwithstanding the unity of possession. The running water over the hopyard was

(*h*) Qy. Tenement.

not parcel of the hopyard, or an easement growing out of it. But if, during the unity of possession, the privilege had been disannexed by the owner, as if the owner had during that period stopped the watercourse, and thus destroyed the privilege, the case would have been otherwise. A subsequent grant of the rectory would then have conveyed only the privileges actually in existence and use at the time of the conveyance." 3 Mason's Rep. 277, 278; see also *Pheysey v. Vicary*, 16 Mees. & W. 484.

It is proposed in this note, to consider the law of Easements, so ably discussed in the principal case, in the following order:—

First, what constitutes an easement. *Secondly*, how an easement may be acquired. *Thirdly*, the incidents of easements. *Fourthly*, the disturbance of easements, and the remedies in respect thereof. *Fifthly*, the extinguishment of easements.

I. *What constitutes an Easement.*

We may define an easement to be a privilege without profit, which the owner of one tenement, which is called the dominant tenement, has over another, which is called the servient tenement, to compel the owner thereof to permit to be done or to refrain from doing something on such tenement for the advantage of the former. Thus, if the owner of estate A. has a right of way over estate B., he can compel the owner of estate B. to permit him to go along the way. So if the owner of estate A. has ancient lights in a house on his estate, he can compel the owner of estate B. not to do any

act on his own land which will deprive him of his accustomed portion of light and air.

The former kind of easement is termed affirmative, the latter negative.

Of *affirmative* easements, that is to say, where the owner of the servient tenement must permit some act to be done thereon by the owner of the dominant tenement (in addition to a right of way), may be mentioned, the right to discharge a stream of water along a certain channel, or rain water by spout or projecting eaves (*Thomas v. Thomas*, 2 Cr. M. & R. 34; *Harvey v. Walters*, 8 L. R., C. P. 162; *Sharpe v. Waterhouse*, 7 Ell. & Bl. 816; *Beeston v. Weate*, 5 Ell. & Bl. 986; 11 Hen. 7, 25 b); the right to pour water over a neighbour's land (*Gaved v. Martyn*, 19 C. B., N. S. 732; 34 L. J., C. P. 353; *Arkwright v. Gell*, 5 M. & W. 203); to pollute water (*Wood v. Waud*, 3 Exch. 748; *Wright v. Williams*, 1 M. & W. 77), or air (*Flight v. Thomas*, 10 Ad. & Ell. 590); the right to go upon a neighbour's land and take water from a spring there (*Race v. Ward*, 4 Ell. & Bl. 702); the right to go upon a neighbour's land to a brook thereon, and when necessary to dam it up, so as to force the water thereof into an old artificial watercourse running through his own land (*Beeston v. Weate*, 5 Ell. & Bl. 986); the right to go upon the soil of another to clear a watercourse and to repair its banks, (*Beeston v. Weate*, 5 Ell. & Bl. 996; *Peter v. Daniel*, 5 C. B. 568); the right to erect a fishing weir on a river (*Rolle v. Whyte*, 3 L. R., Q. B.

286; 8 B. & S. 116); the right to a fender in a mill stream to prevent a waste of water (*Wood v. Hewett*, 8 Q. B., N. S. 913); the right to drive a pile into the bed of a river for the more convenient use and enjoyment of a wharf (*Lancaster v. Eve*, 5 C. B., N. S. 707; 28 L. J., C. P. 235); the right to support from a neighbouring wall (*Solomon v. Vintners' Company*, 4 H. & N. 598); the right to hang clothes on a line passing over the neighbouring soil (*Drewell v. Towler*, 3 B. & Ad. 735), to bury the dead in a particular vault (*Dawney v. Dee*, Cro. Jac. 606; *Bryan v. Whistler*, 8 B. & C. 288; 2 Man. & Ry. 318; see also *Moreland v. Richardson*, 22 Beav. 596), to use a pew in a church (*Brunfitt v. Rogers*, 5 L. R., C. P. 232); the right of having a passage for smoke through a flue (*Hervey v. Smith*, 1 K. & J. 389), or to carry on an offensive trade (*Bliss v. Hall*, 5 Scott, 500); the right to have a name plate on a door (*Lane v. Dixon*, 3 C. B. 776); the right to the occupier of a public-house to erect and repair a sign-post on a common before the public-house (*Hoare v. The Metropolitan Board of Works*, 9 L. R., Q. B. 296); the right to make spoil banks on servient tenement (*Rogers v. Taylor*, 1 H. & N. 706); or to make its surface uneven (*Rowbotham v. Wilson*, 8 H. L. Ca. 362), while working mines; to use it for the purpose of placing muck on, and preparing manure for an adjoining farm. *Pye v. Mumford*, 11 Q. B. 666.

Of negative easements may be mentioned the acquired rights to receive light and air by windows;

as, for instance, where a person builds a house on the extremity of his own lands with windows overlooking the land of a neighbour, the former by uninterrupted enjoyment for twenty years will acquire a prescriptive right to the light received through such windows, and his neighbour will not be allowed to build on his own land so as to affect such right. See post, p. 201.

The acquired right to support of neighbouring soil, where, for instance, a landowner grants part of his land to enable the grantee to build a house on the land granted, the land which he retains becomes subject to an easement for the support of the house when built, there being an implied warranty of support, subjacent and adjacent, as if the house had already existed. *Caledonian Railway Company v. Sprot*, 2 Macq. H. L. Ca. 453.

The right of support to a building erected on a party-wall (*Sheffield Industrial Society v. Jarvis*, 6 W. N. 208; 7 W. N. 47); the right of support to one-half of a party-wall by the other part of the party-wall. See *Fox v. Clarke*, 9 L. R., Q. B. 570, per Brett, J.

Among the distinctive characteristics of easements are the following. They are incorporeal (*Hewlins v. Shippam*, 5 B. & C. 221; 7 D. & R. 783), and are imposed upon corporeal property, and not the owner of it; so that, although the owner of the servient tenement may be changed, the right to the easement still remains in the owner of the dominant tenement for the time being (*Taylor v. Whitehead*, 2 Doug. 749; *Bullard v. Harrison*, 4 Mau. &

Sel. 387; *Pomfret v. Ricroft*, 1 Saund. 322). They must be also imposed for the beneficial enjoyment of real corporeal property (21 Edw. 3, 2, pl. 5; *Bailey v. Appleyard*, 3 Nev. & Per. 257), though possibly of an incorporeal tenement, as a right to get minerals (Gale on Easements, p. 9, 5th ed.; *Rowbotham v. Wilson*, 8 Ho. L. Cas. 348); but they give no right to the owner of the dominant tenement to take any profits, or, as it is termed in our old law books, profit à prendre, as in the case of commons. *Manning v. Wasdale*, 5 A. & E. 758; 1 Nev. & Per. 172; *Blewett v. Tregonning*, 3 A. & E. 554; 5 Nev. & Man. 308; *Bailey v. Appleyard*, 3 Nev. & Per. 257; *Race v. Ward*, 4 Ell. & Bl. 702.

Lastly, the two tenements—the dominant and the servient—must belong to two different persons; for if they become the property of the same person, the easement, as is laid down in the principal case (ante, p. 162), will in general be merged in the ownership. See post, p. 172; *Holmes v. Goring*, 2 Bing. 83; *S.C.*, 9 Moo. 166.

The benefit of an easement passes with the dominant tenement, and the burthen of it passes with the servient tenement to every person to whose occupation the dominant and servient tenements respectively come. *Leech v. Schweder*, 9 L. R., Ch. App. 474.

It may be here mentioned that it is not competent to a grantor to create rights *unconnected with* the use or enjoyment of land, and annex them to it, so as to constitute a property in the grantee. Thus in

Ackroyd v. Smith, 10 C. B. 164, it was held that a right of way cannot be granted so as to pass to the successive owners of land as such, in cases where the way is not connected in some manner with the enjoyment of the land to which it is attempted to make it appurtenant. So in *Hill v. Tupper*, 2 Hurlst. & C. 121, it was held that the grantee from a canal company of the sole and exclusive privilege of having pleasure boats for hire on the canal cannot sue a stranger for the infringement of his right. For although a grantor may bind himself by covenant to allow any right he pleases over his property, he cannot annex to it a new incident, so as to enable the grantee to sue in his own name for an infringement of such a limited right.

Upon the same principle it was held, in *Stockport Waterworks Company v. Potter*, 3 H. & C. 300, that a waterworks company, claiming a right to take water from a river under a grant from a riparian proprietor, cannot sue another riparian proprietor for fouling the water. See also *Bailey v. Stephens*, 12 C. B., N. S. 91; *Ellis v. Mayor of Bridgenorth*, 15 C. B., N. S. 52; *Richards v. Harper*, 1 L. R., Ex. 199; *Keppell v. Bailey*, 2 My. & K. 517, 535; *Thorpe v. Brumfitt*, 8 L. R., Ch. App. 650.

What we term easements, from their being for the ease and benefit of the owner of the dominant tenement, were in the Roman law termed servitudes, from their being a burden imposed upon the owner of the servient tenement.

Prædial or landed servitudes or

easements have been divided, in the Roman law, into rustic and urban; but in the English law a distinction of this kind seems to lead to no useful purposes. *Inst. ff. de Serv. ss. 1, 2; Vinn. ad Inst. lib. 2, tit. 3.*

II. Mode of acquiring Easements.

An easement may be acquired—

1. By express grant; 2. By implied grant; 3. By prescription; 4. By act of parliament. *Richards v. Richards*, Johns. 255.

1. Easements by express Grant.

Where an easement is acquired by express grant, the instrument by which it is created must be under seal. The grant, however, of an easement may be made either separate from or together with the dominant tenement, and a covenant or other instrument under seal, showing the intention of the parties, may take effect as a grant. *Holmes v. Seller*, 3 Lev. 305; *Com. Dig. Chimin, D. 3; Senhouse v. Christian*, 1 T. R. 560; *Gerrard v. Cooke*, 2 Bos. & Pul. N. R. 109; *Northam v. Hurley*, 1 Ell. & Bl. 665; *White v. Leeson*, 5 H. & N. 53; *Rowbotham v. Wilson*, 8 H. L. Cas. 362.

Where in a conveyance of land, the grantor reserving certain rights or interests, as easements, such reservation, if the conveyance be executed by the grantee, will enure by way of re-grant from him to the grantor. See *Duke of Hamilton v. Graham*, 2 L. R., H. L. (Sco.) 168; *Proud v. Bates*, 11 Jur., N. S. 441; 34 L. J., Ch. 406; *Doe d. Douglas v. Lock*, 2 Ad. & Ell. 743; *Wickham v. Hawker*, 7 M. & W. 76; *Durham and Sunderland Railway Company*

v. Walker, 2 Q. B. 967; *Pannell v. Mill*, 3 C. B. 636.

Where there is a conveyance of the dominant tenement, it appears that all easements will pass as appendant. 11 Hen. 6, 22, pl. 19; 2 Roll. Abr. 60, pl. 1; *Beaudely v. Brook*, Cro. Jac. 189; *Canham v. Fiske*, 2 Cr. & J. 126.

And on a demise of land an easement appurtenant thereto, as a right of way, will pass. *Skull v. Glenister*, 16 C. B., N. S. 81; *Thorpe v. Brumfitt*, 8 L. R., Ch. App. 650; *Kavanagh v. Coal Mining Company*, 14 I. C. L. R., N. S. 82.

A covenant for quiet enjoyment extends to an easement appurtenant to the premises in the grant (*Andrews v. Paradise*, 8 Mod. 318; *Morris v. Edgington*, 3 Taunt. 24; and see *Pomfret v. Ricroft*, 1 Saund. 322); but it will not, if in the ordinary form, either enlarge the rights of the grantee or increase the liabilities of the grantor by conferring an easement not within the grant (*Leech v. Schweder*, 9 L. R., Ch. App. 463, 477; see *Blutchford v. Mayor of Plymouth*, 3 Bing. N. C. 691; *Potts v. Smith*, 6 L. R., Eq. 311; *Booth v. Alcock*, 8 L. R., Ch. App. 663). *A fortiori*, it cannot confer an easement to which the grantor was not entitled. *Thackeray v. Wood*, 5 B. & S. 326; 6 B. & S. 766.

Difficulties, however, often arise in determining what easements pass by a conveyance of the dominant tenement, when there has been a unity of possession of the dominant and servient tenement. These, however, will be hereafter considered.

A mere parol licence, at law, con-

ferred no title to an easement, and *might* be recalled at any time, even though money had been paid for it, and without repayment of the money (*Wood v. Leadbitter*, 13 M. & W. 838; overruling *Taylor v. Waters*, 7 Taunt. 374; 2 Marsh. 551; *Smith v. Howth*, 10 Ir. Com. L. Rep., N. S. 125; *Malone v. Harris*, 11 Ir. Ch. Rep. 33; *Taplin v. Florence*, 10 C. B. 744. See also *Hyde v. Graham*, 1 H. & C. 593; *Wakley v. Froggatt*, 2 H. & C. 669; *Roberts v. Rose*, 3 H. & C. 162; *Adams v. Andrews*, 15 Q.B. 284); and it might be determined by a transfer of the subject matter in respect of which the privilege was enjoyed (*Coleman v. Foster*, 1 H. & N. 37; *Judge v. Lowe*, 7 I. R., C. L. 291). In the leading case of *Hewlins v. Shippam*, 5 B. & C. 221; S. C. 7 D. & R. 733, the plaintiff being lessee of an inn, for valuable consideration, obtained the assent of the defendant and his landlord, to his making a drain across the yard of the defendant, whereby he incurred considerable expense. In an action for stopping up the drain, the plaintiff was nonsuited, and a rule nisi obtained by him was discharged. Bayley, J., in delivering the judgment of the Court, observed, "A right of way, or a right of passage for water (where it does not create an interest in the land), is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant, and a freehold interest in it cannot be created or passed (even if a chattel interest may, which I think it cannot). otherwise than by

deed." See also *Bryan v. Whistler*, 8 B. & C. 288; S. C. 2 Man. & Ry. 318; *Bradley v. Gill*, 1 Lutw. 70; *Cocker v. Cowper*, 1 C. M. & R. 418; *Wallis v. Harrison*, 4 M. & W. 538; *Bird v. Higginson*, 6 A. & E. 824.

A parol licence, however, will be an excuse for a trespass, until it be countermanded. Per Bayley, J., in *Hewlins v. Shippam*, 5 B. & C. 233.

Where, however, an agreement for valuable consideration has been entered into to grant an easement (*East India Company v. Vincent*, 2 Atk. 83; *Phillips v. Treeby*, 3 Giff. 632; 8 Jur., N. S. 999); or, for the use of an easement, at any rate where the owner of the servient tenement has stood by and allowed the expenditure of money on the faith of such agreement, a Court of Equity has refused to allow him to recall the licence, and compelled him to execute a proper deed of grant. See *The Duke of Devonshire v. Eglin*, 14 Beav. 530. *Anon.*, 2 Eq. Cas. Abr. 522, pl. 3; *Clavering's Case*, cited 5 Ves. 690, and 6 Hare, 304, n.; *Jackson v. Cator*, 5 Ves. 688; *Gregory v. Mighell*, 18 Ves. 328; *Williams v. Earl of Jersey*, Cr. & Ph. 91; *Powell v. Thomas*, 6 Hare, 300; *Duke of Beaufort v. Patrick*, 17 Beav. 60; *Moreland v. Richardson*, 22 Beav. 596; *Somerset Coal Canal Company v. Harcourt*, 24 Beav. 571; 2 De G. & J. 603; *Bankhart v. Houghton*, 27 Beav. 425; *Laird v. Birkenhead Company*, Johns. 500; *Bell v. Midland Railway Company*, 3 De G. & J. 673; *Mold v. Wheatcroft*, 27 Beav. 510; *Waterlow v. Bacon*, 2 L. R., Eq. 514; *Davies v. Sear*, 7 L. R., Eq. 427.

And a purchaser from the owner of the servient tenement, with actual or constructive notice of an easement, the right to which has been given by an agreement for valuable consideration, will not be able to recall it, although no legal grant may have been executed of such right. See *Hervey v. Smith*, 22 Beav. 299.

Upon the same principle, where the owner of the servient tenement encouraged, or even stood by and allowed the owner of the dominant tenement to lay out money on alterations in easements, the owner of the servient tenement has not been allowed to insist that such easements have been destroyed by such alterations. See *Cotching v. Bassett*, 32 Beav. 101. There the owner of the dominant tenement, in the course of re-building, materially altered his ancient lights. This was done after communication with the owner of the servient tenement, and with the knowledge and under the inspection of his surveyor, but without any express agreement. It was held, by Sir John Romilly, M. R., that in equity, the lights as altered could not be interfered with, and a perpetual injunction was granted. See also *Fisher v. Moon*, 11 L. T. Rep., N. S. 623.

Where, however, there was no clear agreement for the grant or use of an easement, and there has been no outlay of money on the part of the person claiming the easement, for purposes to which such easement would have been essential, the Court of Equity refused to interfere. See *Bankart v. Tennant*, 10 L. R., Eq. 141. There the defen-

dant being the owner of a canal of which the plaintiffs were large customers, a mutual understanding was come to between the parties, that so long as the plaintiffs remained good customers of the canal, they should be allowed to use the superfluous water of the canal for the purposes of copper works, of which they were occupiers under an agreement for a lease with the defendant. It was shown that the use of the water of the canal, though convenient and economical, was not absolutely essential to the plaintiffs' works. It was held by Sir W. M. James, V.-C., that such an understanding did not form the foundation of an equitable right, but that the result would have been different if the plaintiffs, with the knowledge of the defendant, had incurred expense in establishing a manufacture for which the use of the water was absolutely necessary. See and consider *Athol v. The Midland Great Western of Ireland Railway Company*, 3 Ir. R., C. L. 333.

It appears also that even at law, where the owner of the dominant tenement gave the owner of the servient tenement a right to use his own land in a way in which, but for an easement of the owner of the dominant tenement, he would have had a clear right to use it, such licence was not countervailing, at any rate after it had been executed and expenses had been incurred on the faith thereof. *Liggins v. Inge*, 7 Bing. 682. See also *Webb v. Paternoster*, Poph. 151; 2 Roll. Rep. 152; *Winter v. Brockwell*, 8 East, 308; *Blood v. Keller*, 11 Ir. Com. L. Rep., N. S. 124;

Atkinson v. King, 2 L. R., I. 320.

2. *Easements by Implied Grant.*

Easements by implied grant arise, first, upon the severance by the owner of a tenement into two or more parts; secondly, by prescription.

With regard to easements arising upon severance of an heritage, a grant will be implied.

First, of those easements of a continuous and apparent character, which were actually used by the owner during the unity of possession, although they had not, during that period, in strict law the character of easements. Secondly, of easements of necessity, viz., those which are necessary for the use of the severed part of the inheritance.

Implied Grant of Continuous and Apparent Easements on severance of a Tenement into Parts.

Where the owner of two tenements sells one, a grant will be implied of those continuous and apparent easements, which, during the unity of possession, were enjoyed under the title of ownership. For instance, where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possessing the adjoining land, sells the house to another person, although the lights be new, he cannot, nor can any one who claims under him, build upon the adjoining land, so as to obstruct or interrupt the enjoyment of those lights. The reason is founded on the rule that "a man cannot derogate from his

own grant;" for it would be manifestly unjust, when a person had purchased the house, having the apparent and continuous enjoyment of the lights, that he should be deprived of this by the act of the person from whom he purchased. *Palmer v. Fletcher*, 1 Lev. 122; *S. C. nom. Palmer v. Fleshees*, 1 Siderf. 167; *Palmer v. Flessier*, 1 Keb. 553, 625, 794; *Cox v. Matthews*, 1 Vent. 237, 239; *S. C. Rosewell v. Pryor*, 6 Mod. 116; *Compton v. Richards*, 1 Price, 27; *Riviere v. Bower*, 1 Ry. & Moo. 24; *Coutts v. Gorham*, Moo. & Malk. 396; *White v. Bass*, 8 Jur., N. S. 312; *Glave v. Harding*, 27 L. J., Exch. 286; *Murehie v. Black*, 19 C. B., N. S. 190; *Geraghty v. McCann*, 6 I. R., C. L. 411; *Geohagan v. Fegan*, ib. 139.

If the owner of a house sells land on which an obstruction might be erected, or sells the house and reserves to himself the land on which the obstruction may be erected, the right to light and air is gained by an implied grant from what is called the disposition of the owner of the two tenements. Per Mellish, L. J., in *Kelk v. Pearson*, 6 L. R., Ch. App. 813.

But if the grantor is only entitled to the adjoining land for a term of years, the implied grant would only continue during the existence of the term, and would not in the absence of some equity, be continued for a longer period upon his subsequent acquisition of the reversion expectant on the term. *Booth v. Alcock*, 8 L. R., Ch. App. 663.

If, however, a person having both a house and land conveys the land without reserving the benefit

of the lights, there will be no implied grant by the purchaser of the easement of light necessary for the enjoyment of the house of the vendor, and the purchaser may build on the land as he pleases, and the vendor cannot prevent his doing so, even though the buildings erected on it may interfere with his ancient lights. See *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 1093; *White v. Bass*, 7 H. & N. 722; 31 L. J., Ex. 283; *Curriers' Company v. Corbett*, 2 Dr. & Sm. 355; *Ellis v. Manchester Carriage Company, Limited*, 2 C. P. D. 13.

The same principle will be applicable where the severance takes place by the sale of two parts of an inheritance to two strangers at the same time. Thus, in the case of *Swansborough v. Coventry*, 9 Bing. 305, a person sold a house to the plaintiff, and at the same time the adjoining land, upon which an erection of one storey high had formerly stood, to the defendant. In the conveyance to the plaintiff, his house was described as bounded by *building ground* belonging to the defendant. It was held by the Court of Common Pleas that the defendant was not entitled to build to a greater height than one storey, if by so doing he obstructed the plaintiff's lights.

And where the severance takes place by grant to strangers at different times, the grantee of later date, inasmuch as the grantor cannot derogate from the prior grant, will not acquire any right against the prior grantee, except under some grant that could be lawfully made (*Master v. Hansard*, 4 Ch. D. 718); and restrictive covenants for

the benefit of the grantor solely will not in such a case enure for the benefit of the second grantee. *Master v. Hansard*, 4 Ch. D. 718.

Upon the same principle, where the owner of two closes sells one with a run of water upon it, neither the vendor nor any other person claiming under him can obstruct or divert that water, although the conveyance of the land contained no grant of the water. "The conveyance," to use the words of Bayley, J., "passes the land with the easements existing at the time" (*Canham v. Fiske*, 2 C. & J. 126, 128). So in the principal case, where there was no grant of the stream of water by the person who held the two tenements before a severance, it is laid down by Whitlocke, C. J., "that there needed no prescription or custom, for water hath its natural course;" and as was observed by Brudnell in 12 H. 8, "*naturā sud descendit*."

So where the owner of two or more adjoining houses sells and conveys one of them to a purchaser, such house is entitled to the benefit and subject to the burthen of all existing drains communicating with the other house, without any express reservation or grant for that purpose. *Pyer v. Carter*, 1 H. & N. 916; *Nicholas v. Chamberlaine*, Cro. Jac. 121; see also *Ewart v. Cockrane*, 4 Macq. H. L. Ca. 117; 7 Jur., N. S. 925; *Chadwick v. Marsden*, 2 L. R., Exch. 285; *Hall v. Lund*, 1 H. & C. 676; *Wardle v. Brocklehurst*, 1 Ell. & Ell. 1058; *Watts v. Kelson*, 6 L. R., Ch. App. 166.

Where, however, the easement is

not continuous and apparent, as in the case of an ordinary right of way, a grant of it will not be implied, in the absence of language showing that the grantor intended to create the easement *de novo*. *Barlow v. Rhodes*, 1 C. & M. 448; *Worthington v. Gimson*, 2 Ell. & Ell. 618; 6 Jur., N. S. 1053; 29 L. J., Q. B. 116; *Daniel v. Anderson*, 10 W. R. (V.-C. K.) 366; 8 Jur., N. S. 328; *Dodd v. Burchell*, 1 H. & C. 113; *Pearson v. Spencer*, 3 B. & S. 761; *Polden v. Bastard*, 1 L. R., Q. B. 156, 161; 7 B. & S. 130.

Where the owner of a piece of land has a right of way over adjacent land, so that he may maintain at any time an action for an obstruction of it, and afterwards by inheritance or purchase both pieces of land come to one and the same owner, the right is necessarily at an end, the enjoyment thenceforth being the mere exercise of a right of property on his own land. But if, at a later period, the properties again fall into the ownership and possession of different persons, and in the conveyance of the land to which the way was formerly attached, the words are found "together with all ways, &c., used or enjoyed therewith," the effect of these words is to revive the right that formerly existed, and which has been not extinguished, but only suspended (*James v. Plant*, 4 Ad. & Ell. 749); where, however, it does not appear that at any time antecedent to the unity of possession there existed a right of way over one of the pieces of land, attached to the other piece of land, the effect of these words cannot make or re-

vive a right of way that never before existed. *Thompson v. Waterlow*, 6 L. R., Eq. 36; *Langley v. Hammond*, 3 L. R., Ex. 161. See however the remarks of Bramwell, B., *ib.* 170.

As to what words are requisite to pass a right of way upon a severance of the tenements, see *Koostra v. Lucas*, 5 B. & Ald. 830; *Harding v. Wilson*, 2 B. & C. 96; *S. C.* 3 D. & R. 287; *Barlow v. Rhodes*, 1 C. & M. 439; *Plant v. James*, 5 B. & Ad. 791; *S. C.* 2 Nev. & M. 517; *Tatton v. Hammersley*, 3 Ex. 279; *Phesey v. Vicary*, 16 M. & W. 484; *Baird v. Fortune*, 7 Jur., N. S. 926; *Thompson v. Waterlow*, 6 L. R., Eq. 36; *Langley v. Hammond*, 3 L. R., Ex. 161; *Kay v. Oxley*, 10 L. R., Q. B. 360, 361.

An agreement to grant an easement may, it seems, be inferred from the plan of a property on a sale (*Fewster v. Turner*, 11 L. J., Ch. 161; 6 Jur. 144). But, as no man can possess an easement over his own property, where a property is sold in lots, with a condition declaring that each lot was sold "subject to all rights of way and water and other easements, if any, subsisting thereon," such language will not be held to refer to any right of way or water as between one lot and another. *Russell v. Harford*, 2 L. R., Eq. 507.

And where a lessor in a lease describes the premises comprised in the lease as abutting upon a proposed road or street, he is estopped from saying that the premises do not abut upon a road or street, and it will amount to a grant by implication of a right of way from the

demised premises along the site of the proposed road or street. *Roberts v. Karr*, 1 Taunt. 495; *Harding v. Wilson*, 2 B. & C. 96; *Espley v. Wilkes*, 7 L. R., Ex. 298.

An easement will be considered *apparent*, although it may not necessarily be seen, if it be such as that it might be seen or known on a careful inspection by a person ordinarily conversant with the subject. See *Pyer v. Carter*, 1 H. & N. 916; there the plaintiff's and defendant's houses adjoined each other. They had formerly been one house, and were converted into two by the owner of the whole property. Subsequently, the defendant's house was conveyed to him, and, after that, the plaintiff took a conveyance of his house. At the times of these conveyances, a drain ran under the plaintiff's house and thence under the defendant's, and discharged itself into the common sewer. Water from the eaves of the defendant's house fell on the plaintiff's house, and then ran into a drain on the plaintiff's premises and thence through the drain into the common sewer. The plaintiff's house was drained through this drain. It was held by the Court of Exchequer that the plaintiff was by implied grant entitled to have the use of the drain, for it was used at the time of the defendant's purchase of his house. "It was urged," said Watson, B., "that there could be no implied agreement unless the easement was apparent and continuous. The defendant stated he was not aware of this drain at the time of the conveyance to him; but it is clear that he must have known or

ought to have known that some drainage then existed, and if he had inquired he would have known of this drain; therefore it cannot be said that such a drain could not have been supposed to have existed; and we agree with the observation of Mr. Gale [Gale on Easements, p. 53, 2nd ed.], that by '*apparent signs*' must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject. We think it was the defendant's own fault that he did not ascertain what easements the owner of the adjoining house exercised at the time of his purchase." See also *Watts v. Kelson*, 6 L. R., Ch. App. 166, approving of *Pyer v. Carter*, and questioning the dicta of Lord Westbury, C., in *Suffield v. Brown*, 12 W. R. 536.

And a right of way existing before the tenancy may pass to a tenant from year to year by parol as essential to convenient enjoyment. See *Clancy v. Byrne*, 11 I. R., C. L. 355, where it was held, that where it was proved that at the time of the commencement of the tenancy, the way was the usual and recognized way of approach, without which the farm could not be conveniently enjoyed, a finding of a jury might be sustained that the way was enjoyed as of right and not by permission.

It is clear also, as is laid down in the principal case, that an easement to have a fence repaired by the owner of an adjoining tenement is extinguished by unity of ownership. See also *Boyle v. Tamlyn*, 6 B. & C. 329.

Where the person during the unity of possession has altered any easements, or destroyed all external marks thereof, any purchaser from him must either take the easement subject to such alteration, or cannot claim it at all if it be destroyed. Thus it was said by Popham, C. J., in *The Lady Brown's Case*, "If a man hath a stream of water which runneth in a leaden pipe, and he buys the land where the pipe is, and cuts the pipe and destroys it, the watercourse is extinct, because he thereby declares his intention and purpose, that he does not wish to enjoy them together, viz., the watercourse and the land." Palm. 446; and see *Hazard v. Robinson*, 3 Mas. Amer. Rep. 278.

As to the implied grant of a right of support to buildings by buildings, see post, p. 214.

Implied Grant of Easements of Necessity.

Easements of necessity are such as the law presumes from the nature of the case, inasmuch as without them the intention of the parties to the severance of the dominant and servient tenement could not be carried into effect. The rule laid down in Plowden's Commentaries, 16 a, is "that by the grant of anything, *conceditur et id, sine quâ res ipsa haberi non potest*; as if one grants his trees, the grantee may enter upon his land for the cutting down and carrying them away" (5 Bing. N. C. 24). So where trees were excepted by the lessor on an estate demised, it was held by the whole Court, upon an action by the lessee for trespass, that, "when the lessor

excepted the trees, and afterwards had an intention to sell them, the law gave him and them who would buy, power *as incident* to the exception, to enter and show the trees to those who would have them, for without sight none would buy, and without entry they could not see them." *Liford's Case*, 11 Rep. 52 a; *Darcy v. Askwith*, Hob. 234; *Pinnington v. Galland*, 9 Exch. 1.

Upon the same principle, where a grantor had excepted all mines of coal within a close, and reserved the right of sinking and digging of pits for the winning of coal, it was held that "all things that were depending on that right, and necessary for the obtaining it," were reserved also, according to the rule in *Sheppard's Touchstone*, 100; consequently, the coalowner had, as incident thereto, the liberty to dig pits, the right to fix such machinery as would be necessary to drain the mines and draw the coals from the pits. *Dand v. Kingscote*, 6 M. & W. 174, 196; and see *Rogers v. Taylor*, 1 H. & N. 706; *Goold v. The Great Western Deep Coal Company*, 13 W. R. (V.-C.W.) 712; *Ramsay v. Blair*, 1 App. Ca. 702.

So likewise, "where a man having a close surrounded with his own land, grants the close to another in fee, for life or years, the grantee shall have a *way* to the close over the grantor's land, as incident to the grant, for without it he cannot derive any benefit from the grant. So it is where he grants the land, and reserves the close to himself" (1 Wms. Saund. 323. See also 2 Roll. Abr. 60, pl. 17, 18; *S. C.*

Clarke v. Cogge, Cro. Jac. 170; *Jorden v. Atwood*, Owen, 122; *Staple v. Heydon*, 6 Mod. 3; *Packer v. Welstead*, 2 Siderfin, 39; *Dutton v. Tayler*, 2 Lutw. 1487; *Buckby v. Coles*, 5 Taunt. 311; *Hinecliffe v. Lord Kinnoul*, 5 Bing., N. S. 24; *Pinnington v. Galland*, 9 Exch. 1).

So on the sale of land to a purchaser, who has notice that the adjoining land is to be laid out in building in a manner which will make a right of way over the purchased land necessary to the vendor, such right of way is reserved to the vendor by implication as a way of necessity (*Davies v. Sear*, 7 L. R., Eq. 427). But on the sale of a house or stables in a cul de sac, the vendor is not bound to show a title to the roadway. *Curling v. Austin*, 2 Drew. & Sm. 129.

The rule will not be varied where the close is conveyed by a man in his character of trustee, and the land surrounding it is his own, upon the principle that every deed is to be taken most strongly against the grantor, inasmuch as it was competent to the grantor when he granted the close, to grant a right of way over his own land, and that it must be presumed he intended to confer some beneficial interest by the grant, which would not be the case if the grantee had no right of way to the land. *Howton v. Frearson*, 8 T. R. 50, 56.

The rule it appears is also applicable, if the close aliened be not entirely inclosed by the land of the grantor, but partly by the land of strangers; for the grantee cannot go over the land of strangers. See 2 Roll. Abr. tit. "Graunts," Z.,

pl. 18, where, however, a quære is added.

Where there is a grant of lands, with a simple reservation of the coals under such lands, the grantor under such reservation will have no power to carry under those lands, through other strata not consisting of coal, any coals or minerals won and worked from other lands (*Ramsay v. Blair*, 1 App. Ca. 701). *Secus*, where under a grant the whole of the land under the surface, all the coals, and all the metals and minerals, are reserved to the grantor, because such reservation gives him a right of course as upon his own property to make any way for any coals or other minerals that he might have in any other part of his lands. *Ib.* 701, 703.

Where a person contracts to sell land entirely surrounded by the lands of others, a Court of Equity would not, in the absence of special circumstances, decree specific performance of the contract, when it is reasonably uncertain whether any means of entering on the land at all times can be conferred on the purchaser. *Denne v. Light*, 8 De G. Mac. & G. 774.

Amongst other ways of necessity may be mentioned, as laid down in the principal case (p. 165, ante), "the way to church or market;" the right of way by the side of a navigable river (*The Queen v. The Inhabitants of Claworth*, 6 Mod. 163; sed vide *Ball v. Herbert*, 3 T. R. 253, where it is stated that it must be founded either on statute or custom), and the right of a parson to enter and take away tithes *Payne v. Brigham*, 2 Lutw. 1313.

And the way of necessity through the outer close will be a way suitable for the business to be carried on on the other close, and for the carrying on of which thereon the grant was made. *Gayford v. Moffatt*, 4 L. R., Ch. App. 133.

It was laid down in *Holmes v. Goring*, 2 Bing. 84, that an easement of necessity is considered as a grant of no more than the circumstances which raise the implication of necessity require. Thus where a party entitled to a way of necessity, at a subsequent period can approach the place to which it led by passing over his own land, his right of way over the land of another will cease; for if it were otherwise, this inconvenience might follow, that a party might retain a way over 1,000 yards of another's land, when by a subsequent purchase he might reach his destination by passing over 100 yards of his own.

Parke, B., however, in the case of *Proctor v. Hodgson*, 10 Exch. 828, said he considered the Court was wrong in *Holmes v. Goring*, and that he should have thought that an implied grant of a way of necessity "meant as much a grant for ever as if expressly inserted in a deed." And in the subsequent case of *Pearson v. Spencer*, 1 B. & S. 584, it was expressly laid down, that "a way of necessity once created, must remain the same way as long as it continues at all." "We do not," said Blackburn, J., in delivering the judgment of the Court of Queen's Bench, "feel inclined to extend the authority of *Holmes v. Goring*, so far as to hold that the person into whose possession the servient tene-

ment comes, may from time to time vary the direction of the way of necessity, at his pleasure so long as he substitutes a convenient way." *Ib.*; *S. C.* affirmed, 3 B. & S. 761.

It appears that Mansfield, C. J., in *Morris v. Edgington*, 3 Taunt. 31, said that "it would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had." This definition of a necessary way has not been approved of. See *Barlow v. Rhodes*, 1 Cr. & Mees. 449; *Pheysey v. Vicary*, 16 Mees. & W. 484, 492, 495.

There is little authority upon the question, as to the manner in which it is to be ascertained which is to be the direction of a way of necessity. It seems, however, that in every case, the person by whose act the way is created must subsequently select the way, subject only to this, that it should be a convenient way. Thus, in 2 Rolle's Abridgment, p. 60, "Graunts," Z., pl. 17, it is said that the feoffer, who grants the landlocked land and retains the other, which thus becomes the servient tenement, shall assign the way where it is most convenient to himself. In *Packer v. Welstead*, 2 Sid. 39, 111, a case where the grantor retained the landlocked tenement, which became the dominant tenement, it is said that he should take a way, and the law should adjudge if it were a convenient way. See *Pearson v. Spencer*, 1 B. & S. 585, 3 B. & S. 761; *Pinnington v. Galland*, 9 Exch. 1.

Where a portion of land is devised in such a manner as to be

landlocked, the extraneous facts showing that by that devise the testator intended to create a convenient way of some sort over adjoining property of his own, the line of way must be discovered from the language of the will, understood with reference to the state of the property. *Pearson v. Spencer*, 1 B. & S. 571, 585.

It is difficult to state how the way ought to be set out, if the premises before severance were so occupied as to afford no indication of what was the usual way in the testator's time. *Ib.*

In general, especially when there is an occupation by a tenant, there must be an actual existing way by which the premises were used and enjoyed; and in such case the intention of the testator is best effectuated by construing the implied grant of a way to be a grant of that way actually used at the time of the testator's death. *Ib.*

Where there are two ways, each of necessity, the owner of the dominant tenement will be entitled to that which is most convenient to him. *Morris v. Edgington*, 3 Taunt. 24, 31; *Barlow v. Rhodes*, 1 Cr. & M. 439; *Pheysey v. Vicary*, 16 M. & W. 484, 492, 495.

On the grant of the surface of land for a railway, if a certain amount of lateral or subjacent support is essential for the safety of the railway, such right of support must pass as a necessary incident of the grant, and this whether the grant is voluntary or compulsory. *Elliot v. North Eastern Railway Company*, 10 H. L. Ca. 356; *Caledonian Railway Company v. Sprot*, 10 H. L. Ca. 356, cited.

Although it is sometimes said, that by unity of possession ways of convenience are extinguished, but not ways of necessity, the true theory seems to be that, like all other easements, ways of necessity, as well as ways of convenience, are extinguished by unity of possession, but that upon a severance there is an implied grant of new ways of necessity. *Holmes v. Goring*, 2 Bing. 83; *Clark v. Cogge*, Cro. Jac. 170; *Jorden v. Atwood*, Owen, 121; *Packer v. Welstead*, 2 Sid. 111; *Pinnington v. Galland*, 9 Exch. 1.

3. Easements by Prescription.

Time for which Enjoyment must be had.

Another mode in which an easement may be acquired is by prescription.

Formerly a title by prescription could only be acquired, to use the phrase adopted in the principal case, by enjoyment time out of mind, or, in more accurate language, by enjoyment during time whereof the memory of man runneth not to the contrary. And this time was, after previous legislation as to the period of limitation, fixed to commence with the reign of Richard the First. See Statute of Westminster (3 Edw. 1, c. 39); *Angus v. Dalton*, 3 Q.B.D. 103.

The presumption, however, of enjoyment up to so remote a period would, even before the Prescription Act (2 & 3 Will. 4, c. 71), have been raised by proof of an enjoyment as far back as living witnesses could speak (*Jenkins v. Harvey*, 1 Cr. M. & R. 894). A right claimed, how-

ever, by prescription, might always be disproved by showing that it did not or could not exist at any one point of time since the commencement of legal memory (*Bury v. Pope*, Cro. Eliz. 118), or, although it originated before the commencement of legal memory, that at some subsequent period the servient tenement and the dominant tenement once belonged to the same individual, whereby the prescriptive right was extinguished.

Amidst these difficulties it became usual, for the purpose of supporting a right which had been long enjoyed, but which could be shown to have originated within time of legal memory, or to have been at one time extinguished by unity of possession, to resort to the clumsy fiction of a lost grant, which was pleaded to have been made by some person seised in fee of the servient, to another seised in fee of the dominant tenement, and upon enjoyment being proved for *twenty years*, the judges held, or rather directed juries to believe, that a presumption arose that there had been a grant made of the easement, which had been subsequently lost, and consequently, that there was a good title to the easement. *Totty v. Nesbitt*, cited 3 T. R. 157; *Campbell v. Wilson*, 3 East, 294; *Mayor of Hull v. Horner*, Cowp. 102; *Holcroft v. Heel*, 1 Bos. & Pul. 400; *Fenwick v. Reed*, 5 B. & Ald. 232; *Codling v. Johnson*, 9 B. & C. 933; *Penwarden v. Ching*, Moo. & Malk. 400; 1 Real Prop. Comm. Rep. 51.

Besides the objection to its being well known that the plea of a lost grant was unfounded in fact, the

object was often frustrated by proof of the title of the two tenements having been such that the fictitious grant could not have been made in the manner alleged in the plea. *Ib.*

The foundation for presuming a grant against any party is, that the exercise of the adverse right, upon which such presumption is founded, is against a party capable of making a grant, as the owner of the inheritance. If, for instance, a person having a limited interest were in possession of the tenement upon which it is attempted to impose an easement, although there may have been an uninterrupted possession of the easement for twenty years, a grant of it cannot be presumed, inasmuch as a grant, if actually made by a tenant for life, could not bind the remainderman. *Barker v. Richardson*, 4 B. & Ald. 579, 582; see also *Runcorn v. Doe d. Cooper*, 5 B. & C. 696; 8 Dowl. & Ry. 450; *Bright v. Walker*, 1 Cr., M. & R. 222.

Even as against the owner of the inheritance, the presumption of a grant would only be made when he had some probable means of knowing what was done against him. 11 East, 374.

Thus, in *Daniel v. North*, 11 East, 372, where windows had been enjoyed for above twenty years without any interruption by the occupier of the opposite premises, who was tenant to the owner of the inheritance, it was held that no grant could be presumed against the owner. "The tenant," said Bayley, J., "cannot bind the inheritance in this case, either by his own positive act or by his neglect.

If, indeed, the landlord had known of these windows having been put out, and had acquiesced in it for twenty years, that would have bound him, but here there was no evidence that he knew of it till within the last two years." See also *Barker v. Richardson*, 4 B. & Ald. 579; *Runcorn v. Doe d. Cooper*, 5 B. & C. 696; 8 Dowl. & R. 450.

The law as to light has been altered (see p. 185), but the principle upon which this case was decided would still be applicable to easements of a similar character.

Presumptions, however, are sometimes made against the owners of land, during the possession and by the acquiescence of their tenants, in the cases of rights of way, but that happens because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of his landlord as well as his own, and to make common cause with him, but the same cannot be said of lights put out by the neighbours of the tenant, in which he may probably take no concern, as he may have no immediate interest at stake. Per Le Blanc, J., in *Daniel v. North*, 11 East, 375; see also *Gray v. Bond*, 2 Brod. & Bing. 667; 5 J. B. Moo. 527. And see and consider *Wood v. Veal*, 5 B. & Ald. 454; *Davies v. Stephens*, 7 C. & P. 570; *Cross v. Lewis*, 2 B. & C. 686; *Hanks v. Cribbin*, 7 Ir. Com. L. Rep., N. S. 489.

User by any one in possession of the dominant tenement, whether as owner, tenant, or servant, and notwithstanding any personal inca-

capacity, except, perhaps, that of insanity, will be sufficient, if properly exercised, to give a right to an easement. See Gale, Easements, 178, 3rd edit.

The right of user by tin bounders of an artificial stream for the purposes of a tin mine has been held to have been acquired by arrangement with the owners of the mine as well as with the bounders, so as to give the owners a title by prescription to the use of the stream. See *Ivimey v. Stocker*, 1 L. R., Ch. App. 396.

A tenant, however, cannot by user acquire an easement as against his landlord. See *Gayford v. Moffatt*, 4 L. R., Ch. App. 133, 135.

A corporation, moreover, created for a limited purpose, cannot by user acquire an easement, the enjoyment of which would be *extra vires*. Thus, in *The National Guaranteed Manure Company v. Donald*, 4 H. & N. 8, it was held that a company incorporated by act of Parliament for the purpose of making and maintaining a canal, and having powers under their act to take water for the purpose of supplying the canal, cannot by user acquire, under the 2 & 3 Will. 4, c. 71, s. 2, a prescriptive right to take water for any other purpose. See *Mason v. Shrewsbury & Hereford Railway Co.*, 6 L. R., Q. B. 578.

With regard to the quality of enjoyment requisite to give a prescriptive right at common law to an easement, it must have been, in the words of the Roman law, *nec vi—nec clam—nec precario*; that is to say, the enjoyment must have been, first, peaceable, and without inter-

ruption or opposition; secondly, open and without secrecy; and thirdly, as of right, and not under any licence or commission from the owner of the servient tenement. See *Benest v. Pison*, 1 Knapp, P. C. C. 70. See also *Campbell v. Wilson*, 3 East, 294; *Bartlett v. Downes*, 3 B. & C. 621; *Bright v. Walker*, 1 Cr., M. & R. 219; *Monmouthshire Canal Company v. Harford*, 1 Cr., M. & R. 614; *Stockport Waterworks Company v. Potter*, 3 H. & C. 326; *Sampson v. Hoddenott*, 1 C. B., N. S. 590. Fourthly, it must be lawful, *e.g.* not prohibited by statute. *Rolle v. Whyte*, 3 L. R., Q. B. 286; *Lord Leconfield v. Lord Lonsdale*, 5 L. R., C. P. 657.

Prescription at common law and by the fiction of a lost grant being open to many objections, the legislature passed the Prescription Act (2 & 3 Will. 4, c. 71), the object of which was to shorten the period of prescription, and make possession a bar or title of itself, which was so before only by the intervention of a jury. *Bright v. Walker*, 1 Cr., M. & R. 218.

By that act (which is not applicable to Scotland or originally to Ireland, but extended to Ireland by 21 & 22 Vict. c. 42), after the preamble and the first section, which relates to commons and *profits à prendre* (see ante, p. 137), it is amongst other things enacted, "that no claim which may be lawfully made at the common law, by custom, prescription or grant, to any way or other easement or to any water-course, or the use of any water, to be enjoyed or derived upon, over or from any land or water of our lord

the king, his heirs or successors, or being parcel of the Duchy of Lancaster, or the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto, without interruption for the full period of *twenty years*, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of *forty years*, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose *by deed or writing*." Sect. 2.

"That when the access and use of *light* to and for any dwelling-house, workshop or other building, shall have been actually enjoyed therewith for the full period of *twenty years without interruption*, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding; unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose *by deed or writing*." Sect. 3.

"That each of the respective periods of years hereinbefore men-

tioned shall be deemed and taken to be the period *next before some suit or action* wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an *interruption* within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made." Sect. 4.

In actions on the case the claimant may allege his right generally. In pleas to trespass and other pleadings, where the party used to allege his claim from time immemorial, the period mentioned in the act may be alleged; and exceptions or other matters are to be replied specially. Sect. 5.

"That in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years, than for such period or number mentioned in this act, as may be applicable to the case and to the nature of the claim." Sect. 6.

And there is a proviso, "That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis; feme covert or tenant for life, or during which any action or suit

shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinafter mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible." Sect. 7.

There is also a proviso, "That when any land or water upon, over or from which any such way or other *convenient watercourse*, or use of water, shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned during the continuance of such term shall be excluded in the computation of the said period of *forty years*, in case the claim shall, within *three years* next after the end or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof." Sect. 8.

The earlier sections of the statute being in the affirmative, have been held not to take away the common law; and, consequently, not to prevent a party pleading a prescriptive claim, or a claim by lost grant, in the same manner as he might have done before the act passed. In a word, those provisions of the act were intended to give additional facilities to parties, not to deprive them of any rights which they previously possessed. But in order to entitle a party to the benefit of the

statute he must plead it; and it is common in practice for a party to state his claim differently in several counts or pleas, relying in some on the common law, and in others on the statute. Best on Evidence, 489, 3rd edit; see also *Warrick v. Queen's College, Oxford*, 6 L. R., Ch. App. 728; *Ladyman v. Grave*, 6 L. R., Ch. App. 764, n.; *Aynesley v. Glover*, 10 L. R., Ch. App. 283.

Before the statute it was held that as the foundation of presuming a grant against any party was, that the exercise of the adverse right on which such presumption was founded was against the party capable of making the grant, that it could not be presumed against him unless there were some probable means of his knowing what was done against him (*Daniel v. North*, 11 East, 372, 374; *Gray v. Bond*, 2 Brod. & Bing. 667; *Linehan v. Deeble*, 9 Ir. Com. L. Rep. 309); hence, if the land upon which a servitude is attempted to be imposed were in the possession of a person having a limited interest, as a termor or tenant for life, the owner or reversioner would not in general be bound by their acquiescence. *Ib.* See also *Arkwright v. Gell*, 5 M. & W. 203; *Barker v. Richardson*, 4 B. & Ald. 579; *Runcorn v. Doe d. Cooper*, 5 B. & C. 696; 8 Dowl. & Ry. 450.

Since the statute, the enjoyment of light, in order to confer an easement by prescription, under the third section of the act, need not be as of right or adverse. Thus it has been held that the actual enjoyment of light for twenty years, even under a permission verbally asked for by the occupier of a house, and given

by the person having a right to obstruct it, was sufficient to confer a right under the third section of the statute. *The Mayor of London v. The Pewterers' Company*, 2 Mood. & Rob. 409; *Frewen v. Phillips*, 11 C. B., N. S. 449.

But a person cannot claim a prescriptive right to ancient lights against a party about to erect buildings where the latter has been in the habit for many years of obscuring his lights, as, for instance, by making on the same site stacks of hay and corn. *Brook v. Archer*, 3 W. N. 5.

The third section converts into a right such an enjoyment only of access of light over contiguous land as has been had for twenty years in the character of an easement distinct from the enjoyment of the land itself; and the statute places this species of negative easement on the same footing in this respect as those positive easements provided for by the other sections: therefore if the dominant and servient tenement are during the prescribed period in the occupation of the same person, no right is acquired. *Harbidge v. Warwick*, 3 Exch. 552.

Where, however, a right to the easement of light has begun to accrue before unity of possession it will only be suspended during the possession. Thus, if it had been shown that the enjoyment had lasted fifteen years and upwards, and then there had been an interruption by unity of possession, and then the enjoyment had lasted for five years more without the unity of possession, in such case an enjoyment for twenty years could be

pleaded (*Ladyman v. Grave*, 6 L. R., Ch. App. 763, 768). The interruption by unity of possession, moreover, is not an interruption in the sense indicated by the statute, which means an *adverse* interruption. *Ib.* See also *Carr v. Foster*, 3 Q. B. 587.

The third section, moreover, limiting twenty years as the period for acquiring an indefeasible right to the access and use of light, is retrospective, so that such an easement may be acquired by virtue of enjoyment prior to the passing of the Act. *Simper v. Foley*, 2 J. & H. 555.

It will be observed that the acquisition of the easement of light is much favoured, not only inasmuch as a less time confers an *indefeasible* right, but the proviso in the seventh section, which excludes the time when a person otherwise capable of objecting is an infant, idiot, non compos, feme covert or tenant for life, from other periods of computation, includes it in this; and, therefore, if there be an actual enjoyment of light for twenty years, such as the third section contemplates, a right is gained, though the owner of the adjoining property be the occupier, and be for the whole period under disability to grant (per Parke, B., in *Harbidge v. Warwick*, 3 Exch. 556); and one lessee may acquire as against another lessee under the same reversiener an easement for the use of light. *Frewen v. Phillips*, 11 C. B., N. S. 449; 7 Jur., N. S. 1246.

To acquire a right to the access of light and air by *actual enjoyment*, under 2 & 3 Will. 4, c. 71, s. 3, it

is not necessary that the house should be occupied, or that it should be fit for immediate occupation during the statutory period. See *Courtauld v. Legh*, 4 L. R., Ex. 126, there a house was structurally completed, the roof finished, the floors laid, and the windows put in, but it was not internally completed, nor fit for habitation. It so remained till within a period of twenty years before action brought, and was then finished. It was held by the Court of Exchequer that the owner was entitled to maintain an action for the obstruction to the flow of air and light to his windows.

The mere payment of rent by the occupier of a house for the use of lights is not an *interruption* of the enjoyment within the *third* section. *Plasterers' Company v. Parish Clerks' Company*, 6 Exch. 630; in which case it was held that although the plaintiffs had paid the agreed acknowledgments for nearly 200 years, the right of the adjoining owner to build against them was taken away by the act; and an interruption mentioned in the third section means such interruption as is contemplated by the 4th sect., viz. "an interruption submitted to or acquiesced in by the party interrupted for one year after notice." See *Glover v. Coleman*, 10 L. R., C. P. 108.

And in order to negative submission to or acquiescence in the interruption, it is not necessary that the party interrupted shall have brought an action or suit or taken any active steps to remove the obstruction; it is enough to show that he has in a reasonable manner communicated to the party

causing the interruption that he does not really submit to or acquiesce in it. *Glover v. Coleman*, 10 L. R., C. P. 108.

With regard to *other easements than that of light*, as, for instance, a right of way, in order to bring it within the *second* section of the act, it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so "*as of right*," for that is the form in which by sect. 5 such a claim must be pleaded (*Holford v. Hankinson*, 5 Q. B. 584; *Clay v. Thackray*, 9 Car. & P. 47; 2 Moo. & Rob. 244); and the like evidence would have been required before the statute to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly, and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done, if he shall have occasionally asked the permission of the occupier of the land no title would be acquired, because it was not enjoyed "*as of right*." *Tickle v. Brown*, 4 Ad. & Ell. 382; *Warburton v. Parke*, 2 H. & N. 64; *Gaved v. Martyn*, 19 C. B., N. S. 732. For the same reason it would not, if there had been unity of possession during all or part of the time, for then the claimant would not have enjoyed "*as of right*" the easement, but the soil itself. *Onley v. Gardiner*, 4 Mees. & W. 496; *Clay v. Thackray*, 9 Car. & P. 47.

No prescriptive right by user can be founded on the fact that a canal company has for many

years allowed water to pass out of their canal into another canal of another company in a particular manner, so as to prevent the former canal company from afterwards improving its machinery, and economising the water, inasmuch as the water so passing from one canal into the other does not constitute a stream or watercourse within the meaning of the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2. *The Proprietors of the Staffordshire and Worcestershire Canal Navigation v. The Proprietors of the Birmingham Canal Navigation*, 1 L. R., H. L. 254.

As to what constitutes an interruption within the meaning of the act, which must be acquiesced in for a year, see *Carr v. Foster*, 3 Q. B. 581; 2 Gale & Dav. 752; *Ward v. Ward*, 21 L. J., Exch. 334; *Payne v. Sheddon*, 1 M. & Rob. 382; *Parker v. Mitchell*, 11 Ad. & Ell. 788; 3 P. & D. 655; *Flight v. Thomas*, 11 Ad. & Ell. 688; 3 P. & D. 442; 8 C. & F. 311; *Eaton v. Swansea Waterworks Company*, 20 L. J., Q. B. 482; 17 Q. B. 267; *Davies v. Williams*, 20 L. J., Q. B. 330; *Hall v. Swift*, 4 Bing. N. C. 381; 6 Scott, 167; *Lowe v. Carpenter*, 6 Exch. 825.

The question whether there has been acquiescence in an interruption for a year, is properly left to the jury (*Bennison v. Cartwright*, 5 Best & S. 1); and an interruption may be shown to have been not submitted to or acquiesced in though no suit or action has been brought within a year, as for instance, where there has been a correspondence going on between the solicitors

of the parties relative to the interruption. *Ib.*

The claim to an easement may be defeated in any other way by which the same was liable to be defeated before the statute; that is, by the same means by which a similar claim, arising by custom, prescription or grant, would have been defeasible before the statute; and therefore, it may be answered by proof of a grant, or of a licence, written or parol, for a *limited period*, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents during the whole time it was exercised (*Bright v. Walker*, 1 Cr., M. & R. 211, 219. See also *The Monmouthshire Canal Company v. Harford*, 4 Ad. & Ell. 369; *Tickle v. Brown*, 1 Cr., M. & R. 614; *Beasley v. Clarke*, 2 Bing. N. C. 705; *Kinloch v. Nevile*, 6 M. & W. 795; *Mill v. New Forest Commissioners*, 18 C. B. 60), or it may be shown that the right claimed never could have had a legal origin (*Mill v. Commissioners of New Forest*, 18 C. B. 60; *Attorney-General v. Mathias*, 4 K. & J. 579), or could not have been made the subject of a grant. *Carlyon v. Lovering*, 1 H. & N. 784; *Rockdale Canal Company v. Radcliffe*, 18 Q. B. 287.

The enjoyment of an easement as of right for twenty years before the commencement of the suit, within the statute means a *continuous* enjoyment as of right for that period, of the easement as an easement without interruption acquiesced in for a year. "To hold," says Parkc, B., "that the words of the fourth

section might be satisfied by an enjoyment for different intervals, which added together would be twenty years, the last continuing up to the commencement of the suit, would be to let in a great number of cases in which a presumption of a grant never could have existed before the statute. For instance, if the occupier had used the road openly for a year or two, and then uniformly asked permission on each occasion, or used it secretly and by stealth for some years, and then resumed the enjoyment of it, no one would contend that a grant could have been presumed, because the intervals of enjoyment united might amount to twenty years" (*Onley v. Gardiner*, 4 Mees. & W. 496, 500). "A similar reason applies to intervals of unity of possession, during which there is no one who could complain of the user of the road." *Ib.* See *Ladyman v. Grave*, 6 L. R., Ch. App. 763, 768, ante pp. 185, 186, as to Sect. 3. In fact the whole purview of the statute shows, that it applies only to such rights as would before the act have been acquired by presumption of a grant from long user. *Arkwright v. Gell*, 5 Mees. & W. 203, 233.

If an enjoyment for twenty years do not give a good title *against all*, it will give no valid title *at all* to an easement. Thus where a way had been used adversely and under a claim of right, for more than twenty years, over land in the possession of a lessee under a lease for lives granted by the Bishop of Worcester, and it was held that this user gave no right as against the bishop, and did not affect the see, inasmuch as

under the 8th section of the act he might have disputed the right at any time within three years after the expiration of the lease, it was also held, that as the user could not give a title as against *all persons* having estates in the locus in quo, it gave no title as against the lessce and those claiming under him, and that no title was gained by an user which did not give a valid title as against the bishop, and permanently affect the see. *Bright v. Walker*, 1 Cr., M. & R. 211; *In re Harding's Estate*, 8 I. R., Eq. 620; but see *Wilson v. Stanley*, 12 I. R., C. L. 345.

Where the right has been exercised for forty years, under the 2nd section, as of right and without interruption, it will be indefeasible, unless enjoyed by some consent or agreement, and the necessity for its being in writing only exists where the agreement is entered into prior to the forty or twenty years' enjoyment; and where an agreement is made *within* the particular period of forty or twenty years, it may be given in evidence although by parol. *Tickle v. Brown*, 6 Nev. & Man. 230; 4 Ad. & Ell. 369. See also *Beasley v. Clarke*, 2 Bing. N. C. 705; 3 Scott, 258.

It may be here mentioned, with regard to the 2nd section of the act, that it has been decided that it only applies to affirmative easements. *Harbidge v. Warwick*, 3 Exch. 557; *Webb v. Bird*, 10 C. B. (N. S.) 269; 13 C. B. (N. S.) 841; *Murgatroyd v. Robinson*, 7 Ell. & Bl. 391; *Angus v. Dalton*, 3 Q. B. D. 85.

A claim to adulterate the water of a natural stream has been held

to be a claim of a "watercourse" within this section. *Wright v. Williams*, 1 M. & W. 77; *Carlyon v. Lovering*, 1 H. & N. 797.

In order to bring a right within the term "easement" in the 2nd section, it must be one analogous to that of a right which precedes it, and a right of watercourse which follows it, and must be a right of utility and benefit, and not one of mere recreation and amusement. Thus in *Mounsey v. Ismay*, 3 H. & C. 486, it was held that a claim by custom for the freemen and citizens of a town on a particular day in the year to enter upon a close for the purpose of holding horse-races thereon, was not a claim to any "easement" within the 2nd section of the Prescription Act, 2 & 3 Will. 4, c. 71.

The right claimed under the act must be co-extensive with actual user (*Davies v. Williams*, 16 Q. B. 546). "The twenty and forty years," observed Cresswell, J., "depends upon actual user. If a man has gone on increasing the user every year, he has not actually used the stream for the whole period in the manner he claims." *Moore v. Webb*, 1 C. B., N. S. 676.

According to the true construction of the 4th section of the act, the periods for which enjoyment are to be reckoned must be until the *commencement of the suit*, and not until the time when the *injury complained of* was done. *Wright v. Williams*, 1 M. & W. 77; *Jones v. Price*, 3 Bing. N. C. 52; *Lawson v. Langley*, 4 Ad. & Ell. 890; *Richards v. Fry*, 7 Ad. & Ell. 698; *Flight v. Thomas*, 8 C. & F. 242; *Cooper v. Hubbuck*, 12 C. B., N. S. 456.

And where an easement has once been enjoyed as of right, such enjoyment must be taken for the purposes of the act to continue, though interrupted, unless the interruption be acquiesced in for a year (*Flight v. Thomas*, 11 Ad. & Ell. 688; 8 C. & F. 231; *Eaton v. Swansea Waterworks Company*, 17 Q. B. 272). Hence an enjoyment of an easement for nineteen years and a fraction of a year will establish the right to it, provided the action have been brought before the interruption has continued the full period of a year, but after twenty years have elapsed since the commencement of the enjoyment. *Flight v. Thomas*, 11 Ad. & Ell. 688; 8 C. & F. 231.

In order to support the plea of enjoyment during the period, actual user of the easement during the first (*Bailey v. Appleyard*, 8 Ad. & Ell. 161; *Barry v. Lowry*, 11 I. R., C. L. 983) and last (*Parker v. Mitchell*, 11 Ad. & Ell. 788) year, must be shown. The case of *Carr v. Foster*, 3 Q. B. 581, seems to intimate that the intervening period is not so material (per Alderson, B., in *Lowe v. Carpenter*, 6 Exch. 832). Whether that distinction be sound or not, it appears to be a very convenient one; for one or two witnesses might be sufficient to prove the enjoyment at the commencement and expiration of the term, whereas it might require forty witnesses to prove the exercise of the enjoyment during the whole of the intermediate time (Ib.; see also *Ward v. Robins*, 15 M. & W. 241). Parke, B., even went so far as to say that he thought the more correct view was this, "that no right can be obtained

unless a user be proved of the easement at least once a year during the prescribed periods." *Lowe v. Carpenter*, 6 Exch. 831.

Where sect. 4 speaks of the party interrupted, the statute seems to contemplate interruption of the right not of the period. Per Parke, B., in *Flight v. Thomas*, 11 Ad. & Ell. 699.

Section 6 excludes any presumption from proof of the exercise of right during a less period than the previous clauses require. Formerly an immemorial enjoyment was presumed from proof going back to the extent of living memory; now, by section 6, that is no longer permitted. But no difference is made as to the proof of an intermediate user; it is always for the jury to say whether, during any intermediate part of the period, an actual enjoyment has been had. How many times the right has been exercised is not the material question, if the claimant exercised it as often as he chose. Per Patteson, J., in *Carr v. Foster*, 3 Q. B. 587, 588. See also *Darling v. Clue*, 4 F. & F. 329; *Hanmer v. Chance*, 34 L. J., Ch. 413. As to user, which must be proved, see ante, 188.

The provision as to persons under disabilities (sect. 7) does not include persons imprisoned or absent beyond the seas, and although it includes a tenancy for life, it does not include a tenancy for years. *Clayton v. Corby*, 2 Q. B. 824; 2 Gale & D. 182; *Pye v. Mumford*, 11 Q. B. 666.

It will be observed that the 8th section is not extended to all the easements mentioned in the 2nd section, but is confined "to a way

or other convenient watercourse or use of water." This probably arose from miscopying in the 8th section the word "convenient" instead of "easement." *Wright v. Williams*, 1 M. & W. 77. It has been suggested by a learned author "that by reading 'convenience' instead of 'convenient,' a word which, in the old books, is synonymous with easement, the language would be sufficient to give effect to the intentions of the framers of the statute, without any violent perversion of the words." Gale on Easements, 184, 5th ed.

In the computation of the shorter period of the act, viz., *twenty years*, a tenancy for life is *absolutely* excluded (*Wright v. Williams*, 1 M. & W. 100); but it is excluded from the computation of the longer period, *conditionally* only, that is, provided the reversioner expectant on the determination of the term for life shall, within three years (that is probably before the end of three years) after such determination resist the right. *Ib.*

So, likewise, the time during which the servient tenement has been under a lease for a term exceeding three years will be excluded from the computation of forty years, but it will not under section 8 be excluded, like a tenancy for life, from the computation of twenty years' enjoyment. *Palk v. Skinner*, 18 Q. B. 568.

The effect of the 8th section is not to unite discontinuous periods of enjoyment, but to extend the period of continuous enjoyment which is necessary to give a right, by so long time as the land is on lease, subject to the condition there mentioned.

Per Parke, B., in *Onley v. Gardiner*, 4 M. & W. 500.

See further, as to the construction of the Prescription Act (2 & 3 Will. 4, c. 71), Sugd. Prop. Stat. 166, 2nd ed.; Shelf. Real Prop. Stat. 1—121, 6th ed.; Gale, Easements, 151, 5th ed.

*Right to Water when acquired as an Easement by Prescription.
When a Natural Right.*

The right to water running in its natural course arises *ex jure nature* and not from prescription. To use the words of Doddridge, J., in the principal case, "water naturally descends, and is always current, *et aut invenit aut facit viam*."

The right to interfere with the flow of such water, either by throwing it back upon the land above or allowing it to descend only after it has been altered either in quality or quantity in a manner not justified by the natural right is an easement.

The right to running water may be claimed by that rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors and is well established. Each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same where he pleases for any purposes of his own not inconsistent with a similar right in the proprietors of the land above and below; so that the proprietor above can neither diminish the quantity nor injure the quality of the water, which would otherwise

naturally descend; nor can any proprietor below throw back the water without his licence or grant. See *Mason v. Hill*, 5 B. & Ad. 17; 2 Nev. & M. 747; *Wright v. Howard*, 1 S. & S. 190; *Dudden v. The Guardians of Clutton Union*, 1 H. & N. 627; *Elwell v. Crowther*, 6 L. T. Rep., N. S. 596; *Lord Norbury v. Kitchin*, 3 F. & F. 292; *Crossley v. Lightowler*, 3 L. R., Eq. 296; *Van Breda v. Silberbauer*, 3 L. R., P. C. C. 84; *Nuttall v. Bracewell*, 2 L. R., Ex. 1; 4 Hurlst. & C. 714; *Holker v. Porritt*, 8 L. R., Exch. 107; 10 L. R., Exch. 59.

The superior riparian proprietors may use a stream for all reasonable purposes while in their land, provided they send it on without material diminution or alteration to inferior proprietors. *Embrey v. Owen*, 6 Exch. 353; *Sampson v. Hoddinott*, 1 C. B., N. S. 590; *Miner v. Gilmour*, 12 Moo. P. C. C. 131; *Lord v. Commissioners for the City of Sidney*, 12 Moo. P. C. C. 473. In *Weeks v. Heward*, 10 W. R. 557, where the plaintiff sought to restrain the defendant, a surveyor of roads, from draining gravel pits into a stream to the injury of watercress beds of the plaintiff supplied by such stream, Sir W. Page, Wood, V.C., refused the injunction on the ground that the plaintiff had as much right to use the stream for drainage as the plaintiff had for growing watercresses, in the absence of any prescriptive right for that purpose.

But it is clear that the superior will be restrained from such a use of the stream as would be injurious to the inferior proprietors, as by taking from a navigable river so much

water as would impede the navigation (see *Attorney-General v. The Great Eastern Railway Company*, 6 L. R., Ch. App. 572). Purposes more extensive than those for which a riparian proprietor could insist upon may be conferred by act of parliament. *The Medway Company v. The Earl of Romney*, 9 C. B., N. S. 575.

The right of a riparian proprietor *ex jure nature* to use flowing water can be only materially diminished or interfered with by an easement in another person, either by grant or prescription, to use it in a manner inconsistent with its usual course. For instance, if a man erected a new mill upon a stream, a superior riparian proprietor could not by any means divert the water so as to interfere with the beneficial working of the mill save by grant or prescription, and *pari ratione* the person erecting the mill would acquire no right as against inferior riparian proprietors save by grant or prescription. See *Corv. Mattheus*, 1 Vent. 237; *Luttrell's Case*, 4 Co. 86; *Prescott v. Phillips*, cited 6 East, 213; *Saunders v. Newman*, 1 B. & Ald. 258; and see and consider particularly the leading case of *Mason v. Hill*, 5 B. & Ad. 1, where all the authorities are examined by Lord Denman with great learning and accuracy.

It seems at one time to have been thought that in order to entitle a person to recover for a diversion or abstraction of water, that he ought to show the loss of some benefit or the deterioration of the value of the premises, and that an act of appropriation might be useful in order to show that damage had been sus-

tained by the diversion of water from its natural course (*Williams v. Morland*, 2 B. & Cr. 915; *Mason v. Hill*, 3 B. & Ad. 312; see also *Fay v. Prentice*, 1 C. B. 828; *Beeston v. Weate*, 5 Ell. & Bl. 986). It is, however, now clearly settled that an occupier of land may recover for the loss of the general benefit of the water without a special use or special damage being shown (*Palmer v. Kebblethwaite*, 1 Show. 64; *Glynne v. Nichols*, 2 Show. 507; *Sampson v. Hoddinott*, 1 C. B., N. S. 611; *Wood v. Waud*, 3 Exch. 772; *Miner v. Gilmour*, 12 Moo. P. C. C. 156; *Orr Ewing v. Colquhoun*, 2 App. Cas. 839, 854), in the case of the right of water acquired by grant or user, as well as *ex jure naturæ* (*Northam v. Hurley*, 1 Ell. & Bl. 665; *Rawstron v. Taylor*, 11 Exch. 369; *Claxton v. Claxton*, 7 I. R., C. L. 23), and also in the case of an artificial watercourse (*Rochdale Canal Company v. King*, 14 Q. B. 122). So may likewise the inhabitants of a district. *Harrop v. Hirst*, 4 L. R., Exch. 43.

Moreover, where the water is used for illegal purposes, the general principle applies, that although no appreciable damage may be sustained, in the particular instance, by the wrongful act, yet as the repetition of such an act might be made the foundation of claiming a right to do the act thereafter, a damage in law has been already sustained, in respect of which an action is maintainable. Per Coleridge, J., in *Rochdale Canal Company v. King*, 14 Q. B. 134; see also *Wood v. Waud*, 3 Exch. 772.

T.L.C.

The question, what is an unlawful user of water by a riparian proprietor, that is to say, a user beyond his natural rights, so as to give ground for an action, depends upon the circumstances of each case; if, for instance, a proprietor uses the water, for the purpose of irrigation, he may do so, provided he uses it so as not to work any material injury to the rights of other proprietors above and below on the stream (*Embrey v. Owen*, 6 Exch. 353); but if for those purposes he places a bar or weir across a river, so as to prevent its natural course for a certain number of hours, such an act cannot be justified on the ground that it was done for the purpose of improving the adjacent land, whether by irrigation or otherwise. *Sampson v. Hoddinott*, 1 C. B., N. S. 590, 612.

Nor is it a lawful user of a river for a riparian proprietor to erect a permanent building in the channel of the stream (*Bickett v. Morris*, 1 L. R., H. L. Sc. App. 47, 58; and see *Palmer v. Persse*, 11 I. R., Eq. 617); but he might build a boat house on the banks, provided he did not thereby obstruct the river or divert its course (1 L. R., Sc. App. 47). And a riparian proprietor may even, for an ornamental purpose, as a pond, abstract a quantity of water to fill it, provided the quantity abstracted be not unreasonable. *Lord Norbury v. Kitchen*, 3 F. & F. 292; 9 Jur., N. S. 132.

A company purchasing the land of a riparian owner stands in the same position as other riparian proprietors, and can only apply the

O

water for the purposes and in manner allowed by law to every riparian proprietor. Thus, a waterworks company becoming by purchase riparian proprietors will not ordinarily be allowed to collect the water into permanent reservoirs for the supply of adjacent towns (*Swindon Waterworks Company v. Wilts and Berks Canal Navigation Company*, 7 L. R., H. L. Ca. 697; 9 L. R., Ch. App. 451, nom. *Wilts and Berks Canal Company v. Swindon Waterworks Company*; and see *Devery v. Grand Canal Company*, 9 I. R., C. L. 194). So in *Owen v. Davies*, 9 W. N. 175, it was held that a board of health had only the ordinary rights of a riparian proprietor, and were not entitled to divert water into their reservoir.

Companies or other parties acquiring by grant of a riparian proprietor a right to take water to their works by a tunnel through his land, do not become riparian proprietors, and therefore acquire no right to the stream as against other riparian proprietors; nor can they prevent them from fouling it. *Stockport Waterworks Company v. Potter*, 3 H. & C. 300; and see *Hill v. Tupper*, 2 H. & C. 121.

In America, a very liberal use of the stream for the purposes of irrigation and for carrying on manufactures is permitted. So in France, where every one may use it "*en bon père de famille, et pour son plus grand avantage*" (Code Civ. Art. 640, note a, by Paillet, Manuel de Droit Français, Paris, 1838). He may make trenches to conduct the water to irrigate his land, if he returns it with no other loss than that which irrigation has caused.

In the case of *Wood v. Waud*, 3 Exch. 748, it was observed, that in England it is not clear that an user to that extent would be permitted; nor can it be laid down that it would in every case be deemed a lawful enjoyment of the water, if it was again returned into the river with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor. This must depend on the circumstances of each case. On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not. Per Parke, B. in *Embrey v. Owen*, 6 Exch. 371.

The right of a riparian owner to the use of a stream does not depend

on the ownership of the soil of the stream; hence a riparian owner on a navigable, even though it be also a tidal, river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights as an ordinary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation. *Lyon v. Fishmongers' Company*, 1 App. Ca. 662, reversing *S. C.* 10 L. R., Ch. App. 679; *Att.-Gen. v. Earl of Lonsdale*, 7 L. R., Eq. 377. See *Rose v. Groves*, 5 Man. & Gr. 613; *Att.-Gen. v. Conservators of the River Thames*, 1 H. & M. 1.

Thus it has been held that a riparian proprietor on the River Thames, and the owner of lands near a public dock upon the river, were entitled to compensation in respect of their lands being injuriously affected by being deprived of access to the river and to the dock. *The Duke of Buccleuch v. The Metropolitan Board of Works*, 5 L. R., H. L. 418; *The Metropolitan Board of Works v. McCarthy*, 7 L. R., H. L. 243. See also *Re Penny*, 7 Ell. & Bl. 669.

A riparian proprietor, entitled by grant or prescription, to the right of a flow of water from a stream in a goit over the land of another riparian proprietor, may maintain an action against any of the superior riparian proprietors for a disturbance of his rights by the interception of the water of the stream. *Nuttall v. Bracewell*, 2 L. R., Exch. 1; *Holker v. Porritt*, 8 L. R., Exch. 107; 10 L. R., Ex. 59.

Where, however, a riparian proprietor grants to some one, not such

a proprietor, a right to abstract water from the stream, the grantee can, it seems, sue only the grantor for any interference with him. *Stockport Waterworks Company v. Potter*, 3 H. & C. 300.

The right to water exists only where it has a defined course. Therefore, in the case of common surface water, rising out of springy or boggy ground and flowing in no definite channel, though it may contribute to the supply of a mill, the landowner, as the water has no defined course, and its supply casual, may get rid of it in any way he pleases (*Rawstron v. Taylor*, 11 Exch. 369, 382). So in *Broadbent v. Ramsbotham*, 11 Exch. 602, where the plaintiff's mill for more than fifty years had been worked by the stream of a brook, which was supplied by the water of a pond, filled with rain, a shallow well supplied by subterraneous water, a swamp and a well formed by a stream springing out of the side of a hill, the waters of which occasionally overflowed, and ran down the defendant's land in no definite channel into the brook, it was held by the Court of Exchequer, that the plaintiff had no right, as against the defendant, to the natural flow of any of the waters. See *Briscoe v. Drought*, 11 Ir. Com. L. Rep., N. S. 250, and the remarks of Sir J. Stuart, V.-C., in *Ennor v. Barwell*, 2 Giff. 410; *S. C.* on appeal, 1 De G., F. & J. 529; 7 Jur., N. S. 788.

Where the water of a spring flows in a gully or natural channel, the proprietor of the land has no more right to cut off the spring at its source than he has to divert or ab-

stract it lower down. *Dudden v. Guardians of Clutton Union*, 1 H. & N. 627.

The principles which regulate the rights of owners of land in respect to water flowing in known and well-defined channels, whether upon or below the surface of the ground, do not apply to underground water which merely percolates through the strata in no known channels. Thus it has been held, that the owner of land through which water flows in a subterraneous course has no right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry. See *Acton v. Blundell*, 12 Mees. & W. 324, in which Tindal, C. J., in his elaborate judgment, after observing that no case had been cited on either side bearing directly on the subject in dispute, observed, "The authority of one at least of the learned Roman lawyers appears decisive upon the point in favour of the defendant; of some others the opinion is expressed with more obscurity. Digest, lib. 39, tit. 3. *De aquâ et aquæ pluvie arcendâ*, s. 12. '*Denique Marcellus scribit, cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi, nec de dolo, actionem et sane non debet habere, si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit.*'"

So, in the leading case of *Chesmore v. Richards*, 2 H. & N. 168, it was held that the owner of a mill on the banks of a river could not

maintain an action against a landowner who had sunk a deep well on his own land, and by pumps and steam-engines diverted the *underground water*, which would otherwise have percolated the soil and flowed into the river by which for more than sixty years the mill had been worked. This decision was on appeal affirmed by the House of Lords, 7 H. L. Ca. 349. See also *Hammond v. Hall*, 10 Sim. 551; *Stainton v. Woolrych*, 23 Beav. 225; *New River Company v. Johnson*, 2 Ell. & Ell. 435; 29 L. J. (M. C.) 93; 6 Jur., N. S. 374; *The Queen v. Metropolitan Board of Works*, 3 Best & S. 710; *Rylands v. Fletcher*, 3 L. R., H. L. 330. The case of *Dickinson v. The Grand Junction Railway Company*, 7 Exch. 282, may be considered to be overruled, and perhaps also the case of *Balston v. Bensted*, 1 Camp. 463.

Upon the same principle, where the surface and the mines beneath belong to different owners, the owner of the mines is not liable to make compensation for the withdrawal by percolation into the mine of water which would otherwise have flowed into, or having flowed into, would have been retained in the wells and springs of the superjacent land. *The Ballacorkish Silver, Lead, and Copper Mining Co. v. Harrison*, 5 L. R., P. C. 49.

A man, however, may by grant prevent himself, or any one claiming under him, from doing anything which may have the effect of draining underground water from the neighbouring land. *Whitehead v. Parkes*, 2 H. & N. 870.

Although a person has a right by

sinking a well or cutting a drain on his own land, to intercept the water percolating underground from the adjoining land, he will not be allowed by any such operations to diminish the water which flows in a defined surface channel through the adjoining land. *Grand Junction Railway Co. v. Slugar*, 6 L. R., Ch. App. 483; and see *Balla-corkish Silver, Lead, and Copper Mining Co. v. Harrison*, 5 L. R., P. C. 61.

It seems, however, that if the course of a subterranean stream were well known, as is the case of many which sink underground, pursue for a short space a subterranean course, and then emerge again, the owner of the soil under which the stream flowed could maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover had the stream been wholly above ground (per Pollock, C. B., in *Dickinson v. The Grand Junction Canal Company*, 7 Exch. 300, 301; approved of by Lord Chelmsford, C., in *Chesmore v. Richards*, 7 H. L. Ca. 374). So likewise he could recover damages against a person for fouling such stream. *Hodgkinson v. Ennor*, 4 Best & Sm. 229.

A riparian proprietor may by user of the stream in a manner against the natural rights of a landholder higher up, as, for instance, by backing up the stream, render the tenement above a servient tenement. *Sampson v. Hoddinott*, 1 C. B. 611; and see *Saunders v. Newman*, 1 B. & Ald. 258; *O'Brien v. Enright*, 1 I. R., C. L. 718.

Although a riparian proprietor has a right to have the water of a natural stream run through his land, without being polluted by any riparian proprietors or others higher up the stream (*Stockport Waterworks Company v. Potter*, 7 Jur., N. S. 880; 31 L. J., Exch. 9; *Laing v. Whaley*, 3 H. & N. 675; *The Manchester, Sheffield, &c., Railway Company v. The Worksope Board of Health*, 23 Beav. 198; *Hodgkinson v. Ennor*, 4 Best & Sm. 229), that right may be acquired against him by user. See *Carlyon v. Lovering*, 1 H. & N. 784, where the Court of Exchequer held that a right to use a natural stream for the purpose of washing ore, and carrying away sand, stones, and rubble, and other stuff dislodged and severed from the soil in the working of a mine, and winning the ore, might be acquired by custom or prescription at the common law, or by user under 2 & 3 Will. 4, c. 71. But see and consider *Murgatroyd v. Robinson*, 7 Ell. & Bl. 391; *Moore v. Webb*, 1 C. B., N. S. 673.

So a person may acquire a right by prescription to discharge water, either in a pure state or rendered noxious from the precipitation of minerals, by an artificial channel upon or through the land of a neighbour (*Saunders v. Newman*, 1 B. & Ald. 258; *Wright v. Williams*, 1 Mees. & W. 77). So likewise to discharge water through a pipe (*Lady Brown's Case*, cited ante, 166), or from eaves (*Thomas v. Thomas*, 2 Cr., M. & R. 34) on the ground of a neighbour. See also *Pyer v. Carter*, 1 H. & N. 922.

But where the prescriptive right

to foul a stream has been acquired, it must not be considerably enlarged to the prejudice of other people. *Crossley & Sons, Limited, v. Lightowler*, 2 L. R., Ch. App. 478.

The owner of a mine at a higher level than an adjoining mine has a right to work the whole of his mine in the usual and proper manner for the purpose of getting out the minerals in any part of his mine; and he is not liable for any water which flows by gravitation into such adjoining mine from works so conducted (*Baird v. Williamson*, 15 C. B., N. S. 376; *Smith v. Kenrick*, 7 C. B. 515; *Wilson v. Waddell*, 2 App. Ca. 95, 99); but he has no right, in the absence of grant or prescription, by pumping or otherwise, to be an active agent in sending water from his mine into the adjoining mine. *Ib.*

And a person who by digging a pit or shaft intercepts water, which had previously flowed in unascertained underground channels, makes the water his own property, and must take the burden, as well as the benefit of it; and if he afterwards casts it wrongfully on his neighbour's land, he will be liable for the damage done to him. *West Cumberland Iron and Steel Company v. Kenyon*, 6 L. R., Ch. D. 773.

One, moreover, who for his own purposes so manages his land as to collect there in abnormal quantities anything likely to do mischief if it escapes, as for instance water, is *prima facie* answerable for the damage consequent upon its overflow. *Smith v. Fletcher*, 7 L. R., Ex. 305; 9 L. R., Ex. 64; *S. C.*, 2 App.

Ca. 781, nom. *Fletcher v. Smith*; *Fletcher v. Rylands*, 3 L. R., H. L. 330; 1 L. R., Ex. (Ex. Ch.) 265; 3 H. & C. 774; 34 L. J., Ex. 177; *Hurdman v. North Eastern Railway Company*, 3 C. P. D. 168.

Secus, where the overflow has been occasioned by the act of God or *vis major*, as an extraordinary rainfall. *Nichols v. Marsland*, 2 Ex. D. 1; see also *Crompton v. Lea*, 19 L. R., Eq. 115.

So where the occupier of an upper floor of a house has collected the water from the roof by gutters into a box, from which it was ordinarily discharged by a pipe into the drains (*Carstairs v. Taylor*, 6 L. R., Ex. 217), or uses water in cisterns communicating by means of pipes with a water-closet (*Ross v. Fedden*, 7 L. R., Q. B. 661), in the event of an overflow of water from accidental causes, not arising from negligence, the occupier of a lower floor will not be able to recover for any damage done to him by such overflow. But in *Humphries v. Cousins*, 2 C. P. D. 229, the defendant was held liable for an escape of sewage, from the want of repair of a drain under his house, although he was not aware of the existence of the drain.

The right of a party to an artificial watercourse, as against the party creating it, depends upon the character of the watercourse and the circumstances under which it was created. Per Parke, B., in *Greatrex v. Hayward*, 8 Exch. 293.

The enjoyment for twenty years of a stream diverted or penned up by permanent embankments, clearly stands upon a different footing from

the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character, and liable to variation. Per Pollock, C. B., in *Wood v. Waud*, 3 Exch. 777. See also *Magor v. Chadwick*, 11 Ad. & Ell. 571; *North Eastern Railway Company v. Elliot*, 1 J. & H. 145.

The user of an artificial channel of a temporary character by the owner of the dominant tenement, for his own convenience, by which he discharges water through the land of the owner of the servient tenement, will not confer an easement upon the latter by which he can compel the owner of the dominant tenement to discharge the water along the artificial channel, and, consequently, he may discontinue to do so when he pleases. See *Arkwright v. Gell*, 5 Mees. & W. 203, in which case mills having been erected by the owner of the servient tenement by the side of a sough or level, by means of which the owner of the dominant tenement had drained his mines: it was held by the Court of Exchequer that twenty years' user of the water for the purposes of the mills did not give the latter a right to the discharge of the water, either from the presumption of a grant or by force of the statute (2 & 3 Will. 4, c. 71, s. 2). See also *Wood v. Waud*, 3 Exch. 748; *Briscoe v. Drought*, 11 Ir. Com. L. Rep., N. S. 250; *Mason v. Shrewsbury and Hereford Railway Company*, 6 L. R., Q. B. 578; *Waller v. Mayor of Manchester*, 6 H. & N. 667.

Upon the same principle it was

held in *Greatrex v. Hayward*, 8 Exch. 291, that the flow of water from a drain made for the purposes of agricultural improvements did not give a right to the neighbour, so as to preclude the proprietor from altering the level of his drain for the improvement of his land. "Take," said Alderson, B., "the case of a farmer, who, under the old system of farming, has allowed the liquid manure from his fold-yard to run into a pit in his neighbour's field; but, upon finding that the manure can be beneficially applied to his own land, has stopped the flow of it into his neighbour's pit, and converted it to his own use. Could it be contended that the fact of his neighbour having used this manure for upwards of twenty years, would give the latter the right of requiring its continuance?"

The case of *Magor v. Chadwick*, 11 Ad. & Ell. 571, might at first sight seem to be at variance with these authorities. There the owners of a mine had made an adit through their lands to drain the mine, which they afterwards ceased to work; and the owner of a brewery, through whose premises the water flowed for twenty years after the working had ceased, had, during that time, used it for brewing. It was held by the Court of Queen's Bench that he had thereby gained a right to the undisturbed enjoyment of the water, at any rate as against the defendants, who were the owners of other mines, who were not shown to be connected with, or to claim under, the owners of the adit and old mine; and that, consequently they could not use the adit for the purpose of draining

their mines, by which the water was rendered foul and unfit for brewing. Pollock, C. B., with reference to this case, as distinguished from *Arkwright v. Gell*, has observed, "that the action was not brought against the party in whose land the artificial watercourse commenced, nor anyone claiming under him, and he had not put an end to it by altering the mode of working his mines; but what is more important, the action was not brought for abstracting, but for fouling the water, a species of injury which does not stand on the same footing; for though the possessor of the mine might stop the stream, it does not follow that he or any other could pollute it whilst it continued to run." *Wood v. Waud*, 3 Exch. 777; see also *Whaley v. Laing*, 2 H. & N. 476; 3 H. & N. 675, 901; *Hodgkinson v. Ennor*, 4 Best & S. 229.

Enjoyment and acts which, without the existence of an easement, would be tortious and actionable, may be evidence of the right to the use of water, although it flows through an artificial cut. *Beeston v. Weate*, 5 Ell. & Bl. 986; see *Sutcliffe v. Booth*, 9 Jur., N. S. 1037; *Gaved v. Martyn*, 19 C. B., N. S. 732; *Ivimey v. Stocker*, 1 L. R., Ch. App. 396; *Athol v. Midland Great Western Railway Company*, 3 I. R., C. L. 333; *Powell v. Butler*, 5 I. R., C. L. 309.

A company incorporated by act of Parliament for the purpose of making and maintaining a canal, and having powers under their act to take water for the purpose of supplying the canal, cannot by user acquire, under the 2 & 3 Will. 4, c.

71, s. 2, a prescriptive right to take the water for any other purpose. *The National Guaranteed Manure Company v. Donald*, 4 H. & N. 8.

When powers are granted by act of Parliament to a public company for specific purposes, as for instance to a canal company for making and maintaining a free communication between different places by navigable canals, the ordinary doctrines as to the permissive use of water, will not apply in such a case, and no grant can be made by the canal company of the use of any water which might injuriously affect those purposes. *The Proprietors of Staffordshire and Worcestershire Canal Navigation v. Proprietors of Birmingham Canal Navigation*, 1 L. R., H. L. 254.

Consequently no right by prescription could, in such a case, have any foundation in grant. *Ib.*

Right to light and air.

According to the ordinary rule of law, *Cujus est solum, ejus est usque ad cælum*, whoever has then got the site is the owner of everything up to the sky, and therefore to the vertical column of air above the site. 9 L. R., Eq. 673. See also *Pickering v. Rudd*, 4 Camp. 219; *Fay v. Prentice*, 1 C. B. 828.

The ordinary presumption of law may be rebutted, particularly with regard to property in towns, by the fact that other adjoining tenements, either from there having been once a joint ownership or from other circumstances, protrude themselves over the site. 9 L. R., Eq. 673.

A protrusion, however, of a portion of the upper floor of a house,

which remains the property of a person who has sold the adjoining house and its site, over which such portion protrudes, will not, in the absence of contract, interfere with the right of the purchaser to the ownership of the vertical column of air in accordance with the general rule. *Corbett v. Hill*, 9 L. R., Eq. 671. See and consider *Kerslake v. White*, 2 Stark. 508; *Martyn v. Lawrence*, 2 De G. J. & S. 261.

The person who builds a house on the extremity of his land is only entitled to the light above it according to the maxim, *Cujus est solum ejus est usque ad cælum et ad inferos*, and is not entitled of common right to the lateral passage of light. This he can only claim as an easement, and not by a single act of appropriation. Where, therefore a person builds upon the furthest extremity of his own land, with windows opening towards his neighbour's land, although the latter cannot complain that his privacy is thereby violated, he may at any time within twenty years, by building or otherwise upon his own land, obstruct the windows so as to prevent the acquisition of an easement. (*Chandler v. Thompson*, 3 Camp. 82; *Moore v. Rawson*, 3 B. & C. 340.) After the expiration of that period, both before (*Moore v. Rawson*, 3 B. & C. 340) and after the statute 2 & 3 Will. 4, c. 71 (see ante, pp. 183, 185), the owner of the buildings will acquire a right to the light by prescription, and his neighbour cannot either by a new erection, or by raising an old one to a greater height, materially interfere with its enjoyment. *Dunball v.*

Walters, 35 Beav. 565; *Yates v. Jack*, 1 L. R., Ch. App. 295; see also *Penwarden v. Ching*, Moo. & Malk. 400.

An exception, it seems, occurs in the case of a railway acquiring land in fee simple, for although it does so, it acquires it solely for the purpose of constructing and using the railway, and will therefore have no right to erect hoardings to prevent prescriptive rights being acquired for windows looking across the line of railway. *Norton v. London and North Western Railway Company*, 9 Ch. D. 623.

The statute, however, under which twenty years' enjoyment gives a title to light, has not altered the nature of the right, or the principle on which it is to be determined whether the right has been infringed, but it has merely substituted a statutory title for the fiction of a presumed grant. Per Lord Selborne, L. C., in *City of London Brewery Company v. Tenant*, 9 L. R., Ch. App. 219.

The nature and extent of the right before the statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable ease and enjoyment of that house as a dwelling house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business. That was the extent of the easement—a right to prevent your neighbour from building upon his land so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and en-

joyable. . . . The statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. Per Sir W. M. James, L. J., in *Kelk v. Pearson*, 6 L. R., Ch. App. 811, approved by Lord Selborne, L. C., in *City of London Brewery Company v. Tennant*, 9 L. R., Ch. App. 218; *Mackey v. Scottish Widows Society*, 11 I. R., Eq. 114, reversing *S. C.*, 10 I. R., Eq. 541; and see and consider *Yates v. Jack*, 1 L. R., Ch. App. 295, 2 Hem. & Mill. 650; *Dent v. Auction Mart Company*, 2 L. R., Eq. 238; *Clarke v. Clark*, 1 L. R., Ch. App. 16; *Lanfranchi v. Mackenzie*, 4 L. R., Eq. 421.

The owner of the dominant tenement is entitled to the same *quantum* of light as he had enjoyed during the period which has gained a right by prescription, irrespective of the purpose for which he had enjoyed it. In determining therefore whether any obstruction interferes injuriously with the right to access of light, the true test will be not whether there remains sufficient light for the dominant tenement, according to the actual mode of occupation, but whether there exists an actual diminution of light which is injurious to the tenement, either in its then existent or in any future condition. See *Luttrell's Case*, 4 Rep. 87 a; *Roberts v. Macord*, 1 Moo. & Rob. 230; *Moore v. Hall*, 3 Q. B. D. 178; *Aynsley v. Glover*, 18 L. R., Eq. 544; 10 L. R., Ch. App. 283; *Yates v. Jack*, 1 L. R., Ch. App. 298; *Dent v. Auction Mart Company*, 2 L. R., Eq. 238; *Calcraft v. Thompson*, 15 W. R. 387; *Courtauld v. Legh*, 4

L. R., Ex. 126; *Young v. Shaper*, 21 W. R. 135, overruling on this point *Martin v. Goble*, 1 Campb. 320; *Jackson v. Duke of Newcastle*, 3 De G., J. & S. 275.

The onus, however, of proving that there has been a substantial diminution of the light lies on the plaintiff, and where the plaintiff, although he shows some loss of light, fails to show such an obstruction of light as to interfere with the ordinary occupations of life, the Court will not interfere (*Clarke v. Clark*, 1 L. R., Ch. App. 16; *Lanfranchi v. Mackenzie*, 4 L. R., Eq. 421; *Adamson v. Gatty*, 5 W. R. 184; *Dickinson v. Harbottle*, 28 L. T., N. S. 186); and it seems that in order to establish a right to an extraordinary amount of light necessary for a particular purpose or business to an ancient window, open, uninterrupted and known enjoyment of such light in the manner in which it is at present enjoyed and claimed must be shown for a period of twenty years. *Lanfranchi v. Mackenzie*, 4 L. R., Eq. 421; *Adamson v. Gatty*, 5 W. R. 184; *Dickinson v. Harbottle*, 28 L. T., N. S. 186.

And where the plaintiff was described in a lease as a diamond merchant, it was held that the landlord was not at liberty to assert that he was only entitled to the ordinary light of a dwelling-house, and that a very small diminution or alteration in the light being injurious to a person carrying on such a trade, he was entitled to relief. See *Hertz v. The Union Bank of London*, 2 Giff. 686.

Expressions were made use of by

Lord Cranworth, L. C., in *Clarke v. Clark*, 1 L. R., Ch. App. 16, which were calculated to produce, and which did in fact produce, the impression that he was of opinion that when the light and air coming from ancient windows in a house in any large town will be obstructed by buildings about to be erected, the owner of such ancient lights must, in order to entitle him to relief, make out a greater degree of damnification than he would be obliged to make out if his house had been situated in the country. This case was to a certain extent followed by the Lords Justices in the cases of *Durell v. Pritchard*, 1 L. R., Ch. App. 244, and *Robson v. Whittingham*, *Ib.* 442. However, in *Yates v. Jack*, 1 L. R., Ch. App. 295, Lord Cranworth, L. C., though not in express terms repudiating that principle, used language that amounted to a negation of it, and it has since been distinctly decided that with respect to the owner of ancient lights to be protected against any obstruction to the access of light and air to his windows, there is no distinction between houses in towns and houses in the country. *Dent v. The Auction Mart Company*, 2 L. R., Eq. 238; *Martin v. Headon*, 2 L. R., Eq. 425.

The question how far any alteration in windows by the owner of the dominant tenement will affect his right, will be hereafter considered. See pp. 234, 235.

By the custom of London, a building might be raised upon the old foundation to any height, although ancient windows or lights in the

next house were stopped, if there were no agreement in writing restrictive of the custom (*Com. Dig. London, N (5)*; *Winstanley v. Lee*, 2 Swanst. 339). This custom, however, was abrogated by 2 & 3 Will. 4, c. 71, s. 3; *Salters' Company v. Jay*, 3 Q. B. 109; *Truscott v. Merchant Tailors' Company*, 11 Exch. 855; *Yates v. Jack*, 1 L. R., Ch. App. 295, 299.

Right of Prospect.

A right to a *prospect* can be acquired only by grant or covenant, and not by prescription. Thus, in *Attorney-General v. Doughty*, 2 Ves. 453, where a motion was made to stop proceeding in certain buildings which would intercept the prospect from Gray's Inn Gardens, Lord Hardwicke, C., refused to grant an injunction before answer. "I know," said his Lordship, "of no general rule of common law which says, that building so as to stop another's prospect is a nuisance. Were that the case there could be no great town, and I must grant injunctions to all the new buildings in this town: it depends, therefore, on particular right, and then the party must first have an opportunity to answer it. . . . There may be such a right as this, as upon the act of parliament touching Lincoln's Inn. That was upon agreement of the parties, which if shown here would be different, or if there was ground to presume such an agreement, but then the party must have an opportunity to answer that." See also *Aldred's Case*, 9 Co. Rep. 58 b.

So the erection of a building will not be restrained because it

injures the plaintiff by obstructing the view of his place of business. *Butt v. Imperial Gas Company*, 2 L. R., Ch. App. 158.

A person may acquire a right to have an uninterrupted prospect by a contract (*Squire v. Campbell*, 1 My. & Cr. 459; *Tulk v. Moxhay*, 2 Ph. 774; *Western v. Maedermot*, 1 L. R., Eq. 499; 2 L. R., Ch. App. 72), or where he has been induced to build upon the faith of a representation made to him that a particular view or prospect cannot be interfered with. See *Piggott v. Stratton*, Johns. 341; 1 De G., F. & J. 33.

Air and Wind.

The question has been raised whether a person is entitled to have the full and uninterrupted access to an ancient mill of the currents of wind and air which are essential to its use. In an *Anonymous* case, Winch's Reports, 3 (cited Vin. Abr. Nuisance (G.) pl. 16, Winch, J., said, "that it was adjudged in this court (Common Bench), that where one erected a house so high in Finsbury Fields by the windmills, that the wind was stopped from them, that it was adjudged in this case that the house shall be broken down."

In Rolle's Abridgment, Trial, pl. 23, "In an assise of nuisance brought because levavit domum ad nocumentum of his mill, by which the wind is prevented from coming to his mill, so that he cannot grind, &c., and the jury found that the defendant had erected a new house, and that only two yards on the top of the house is a nuisance; this

is found for the plaintiff, for here the declaration is not falsified but only abridged, and the judgment shall be that the two yards be cast down." *Trahern's Case*, Godbolt, 233.

In *Goodman and Gore's Case*, Godbolt, 189, it is said that Goodman brought an assise against Gore and others for erecting two houses at the west end of his windmill per quod ventus impeditur, &c. And it was given in evidence that the said houses were situate about eighty feet from the said mill, and that in height it did extend above the top of the mill, and in length it was twelve yards from the mill, and notwithstanding this nearness the Court directed the jury to find for the defendant.

In the case of *Webb v. Bird*, 10 C. B., N. S. 268, it has been determined by the Court of Common Pleas that the owner of a windmill cannot claim, either by prescription or presumption of a grant arising from twenty years' acquiescence, to be entitled to the free and uninterrupted passage of the currents of wind and air to his mill; and that such a claim is not within the second section of 2 & 3 Will. 4, c. 71, which is confined to rights of way or other easements to be exercised upon or over the surface of the adjoining land.

In giving judgment their Lordships thought that the cases referred to in Winch and in Rolle's Abridgment, might be explained in consequence of the mills in those cases having been privileged mills, where the lord of the manor had a prescriptive right to compel all the resi-

dents within the manor to grind their corn. And Byles, J., said, "The right to light has led to difficulty enough. But a claim to have an uninterrupted flow of wind and air to a mill, whose position varies according to the quarter from which the wind blows, would from its extensive nature give rise to infinitely more litigation. If such a right exists as to a mill, it must equally exist as to weather-cocks," p. 286. This judgment has been lately affirmed by the Exchequer Chamber. See 13 C. B., N. S. 841.

As to the right of air through windows, see *Moseley v. Bland*, 9 Rep. 58 a, cited; *Gale v. Abbot*, 8 Jur., N. S. 987; *Dent v. Auction Mart Company*, 2 L. R., Eq. 238; *Johnson v. Wyatt*, 2 De G., J. & S. 18; 9 Jur., N. S. 1333; *Curriers' Company v. Corbett*, 11 Jur., N. S. 719.

Rights of Way.

Rights of way being of various kinds, often for limited purposes, as a foot-way (*Cousens v. Rose*, 12 L. R., Eq. 366), a horse-way, a carriage-way (*Watts v. Kelson*, 6 L. R., Ch. App. 166), a way to church (Vin. Abr. Nuisance, H. 15), a way to a building of a particular kind (*Allan v. Gomme*, 11 Ad. & Ell. 760, and see *Henning v. Burnet*, 8 Exch. 194); sometimes for particular articles only, as for agricultural produce only (*Jackson v. Stacey*, Holt's N. P. 455; *Bradburn v. Morris*, 3 Ch. D. 812), the carriage of water only (*Knight v. Woore*, cited 5 Bing. N. C. 625), or coal only (*Iveson v. Moore*, Ld. Raym. 486; 1 Salk. 15), or for all articles except coal (*Marquis of*

Stafford v. Coyney, 7 B. & C. 257); for all purposes for which it was wanted in a former condition of the property (*Wimbledon and Putney Commons Conservators v. Dixon*, 1 Ch. D. 362); it is clear that no greater or any different servitude can be imposed upon the owner of the servient tenement.

In the case of a grant, the grant itself (*Brunton v. Hall*, 1 G. & D. 207), in the case of prescription, the usage of the owner of the dominant tenement (*Cowling v. Higginson*, 4 Mees. & W. 245), will be the test for determining the extent of his right.

And in the absence of any clear indication of the intention of the parties, the maxim that a grant must be construed most strongly against the grantor must be applied. Thus, in *South Metropolitan Cemetery Company v. Eden*, 16 C. B. 42, where a grant was produced without stating the object of the grant, it was the opinion of the judges that the grant was general, and that the way in that case might be used to any part of the land to which the way was granted.

In the Roman law a superior right of way included within itself those of an inferior class, see I. ff. de Serv. præd. (Lib. 2, tit. 3), where it is said, "*Iter est jus eundi ambulandi hominis, non etiam jumentum agendi vel vehiculum. Actus est jus agendi vel jumentum vel vehiculum. Ita qui iter habet, actum non habet; qui actum habet, et iter habet (eoque uti potest), etiam sine jumento. Via est jus eundi et agendi et ambulandi; nam et iter et actum via in se continet.*" See also Co. Litt. 56 a.

This seems scarcely to be the case

with the English law, although it may be matter for the consideration of a jury. Thus evidence of a prescriptive right of way for all manner of carriages does not necessarily prove a right of way for all manner of cattle, though it may be evidence of a drift-way, for the jury to consider together with other evidence (*Ballard v. Dyson*, 1 Taunt. 279). "I have always," said Mansfield, C.J., "considered it as a matter of evidence, and a proper question for a jury, to find whether a right of way for cattle is to be presumed from the usage proved of a cart-way. Consequently, although in certain cases a general way for carriages may be good evidence, from which a jury may infer a right of this kind, yet it is only evidence; and they are to compare the reasons which they have for forming an opinion on either side. As well at the trial as since, I have thought that there might often be good reasons why a man should grant a right of carriage-way, and yet no way for cattle. That would be the case where a person who lived next to a mews in London should let a part of his own stable with a right of carriage-way to it which would be used with very little, if any, inconvenience to himself; yet there it would be a monstrous inference to conclude, that if a butcher could establish a slaughter-house at the inner end of the mews, without being indictable for a nuisance, he might therefore drive horned cattle to it, which would be an intolerable annoyance to the grantor. So cases may exist of a grant of land, where, from the nature of the premises, permission

must be given to drive a cart to bring corn or the like, and the right might be exercised without any inconvenience to the grantor; but it does not follow that cattle may be driven there." See also *Cowling v. Higginson*, 4 Mees. & W. 245; *Higham v. Rabett*, 5 Bing. N. C. 622; 7 Scott, 827; *Brunton v. Hall*, 1 Gale & Dav. 207; *Durham and Sunderland Railway Company v. Walker*, 2 Q. B. 963; *Dare v. Heathcote*, 25 L. J., N. S., Exch. 245; *Hawkins v. Carbines*, 27 L. J., Exch. 44; *Dyce v. Hay*, 1 Macq. H. L. Cas. 305; *Allen v. Gomme*, 11 Ad. & Ell. 759; *Henning v. Burnet*, 8 Exch. 194.

Where a person is possessed of a close, the only approach to which is along a way through closes belonging to such person and another, in the absence of any direct evidence of ownership, the presumption is that the soil of the way belongs in moieties to the owners of the adjoining closes, and that in respect of the close at the end of the way, the owner thereof has a mere easement. *Smith v. Howden*, 14 C. B., N. S. 398; and see *Holmes v. Bellingham*, 7 C. B., N. S. 329.

And it seems that where an occupation road follows the boundary of two estates so as to afford a presumption of ownership *ad medium filum*, such owner has the right to use the road for all purposes, though the actual user has been only for limited purposes. *Bradburn v. Morris*, 3 Ch. D. 812.

Right to Natural Support to Land.

Every man is entitled to have his land in its *natural state* supported

by the adjacent land of his neighbour, against whom an action will lie if by digging on his own land he removes that support, quite independent of the fact whether his workings are skilfully or unskilfully conducted. *Wilde v. Minsterley*, 2 Roll. Abr. 564, Trespass, Justification, I. pl. 1; *Humphries v. Brogden*, 12 Q. B. 743; *Hunt v. Peake*, Johns. 710.

Where, however, the land is not in its natural state, as, for instance, from having been formerly excavated, the owner thereof cannot complain of operations by the proprietor of the adjacent land, which, if the excavations had not been made, would not have occasioned any substantial injury. See *Corporation of Birmingham v. Allen*, 6 Ch. D. 284.

This right to lateral support from adjoining soil is not an easement, or like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil. Thus, if the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed, as much as after the expiration of twenty years, or any longer period. Per Lord Campbell, C. J., in *Humphries v. Brogden*, 12 Q. B. 744.

The right to the lateral support of the land of a neighbour is an implied one, and is capable of being rebutted by the existence of stipulations which are inconsistent with it (*Murehie v. Black*, 19 C. B., N. S. 190). And stipulations as to the

manner of working the minerals and for compensation do not alter the case. *Humphries v. Brogden*, 12 Q. B. 739; *Harris v. Ryding*, 5 M. & W. 60; *Roberts v. Haines*, 6 Ell. & Bl. 643; 7 Ib. 625.

Upon the same principle, where the surface of land, and the minerals under it, are held as separate tenements by different owners, of common right the owner of the surface is entitled to support from the subjacent strata, without reference to the nature of the strata, or the difficulty of propping up the surface (*Humphries v. Brogden*, 12 Q. B. 739; *Rowbotham v. Wilson*, 6 Ell. & Bl. 593; *Roberts v. Haines*, 7 Ell. & Bl. 625; *Harris & Ryding*, 5 M. & W. 60; see also *Rogers v. Taylor*, 2 H. & N. 828). And even although there be an absence of negligence in working the mines. *Humphries v. Brogden*, 12 Q. B. 739; *Brown v. Robins*, 4 H. & N. 186; *Hunt v. Peake*, John. 705; *Stroyan v. Knowles*, 6 H. & N. 454; *Smart v. Morton*, 5 Ell. & Bl. 30.

No cause of action, however, will accrue to the owner of land against his neighbour who withdraws or excavates the soil on his own land, so long as no damage is occasioned thereby; it only accrues so as to cause the Statute of Limitations to run when the actual damage first took place (*Bonomi v. Backhouse*, 2 Ell. B. & Ell. 622, 659; 7 Jur., N. S. 809; 9 H. L. Ca. 503, nom. *Backhouse v. Bonomi*). Secus, where the minerals taken belong to the owner of the surface. *Spoor v. Green*, 9 L. R., Ex. 99.

It seems that as damages resulting from one and the same cause of

action must be assessed and recovered once for all, that not only existing but future damage may be recovered in an action for injury to the plaintiff's land and buildings, by removal of lateral support through necessary operations carried on by the defendant on his own land adjoining. *Lamb v. Walker*, 3 Q. B. D. 389, Cockburn, C. J., diss.

Inasmuch as a person has a clear right to build as he thinks fit on his own land, upon the assumption that sufficient support will be left to bear the burden of the soil itself, he may bring an action for damages occasioned by the subsidence of the soil, on account of the withdrawal of the lateral or vortical support to which he was entitled from his neighbour's soil, although the houses have been erected within twenty years, *provided their weight did not contribute to the subsidence*. *Brown v. Robins*, 4 H. & N. 186; *Stroyan v. Knowles*, and *Hamer v. Knowles*, 6 H. & N. 454; *Hunt v. Peake*, Johns. 705; and see *Smith v. Thackerah*, 1 L. R., C. P. 569. There A. dug a well near B.'s land, and afterwards filled up the well with such loose earth that the ground round it sank, and a building erected on B.'s land within twenty years fell, and it was proved that if the building had not been on B.'s land, the land would still have sank, but the damage to B. would have been inappreciable. It was held by the Court of Common Pleas that B. had no right of action against A. "For a man to dig a hole," said Earle, C. J., "in his own land is in itself a perfectly lawful act of owner-

ship, and it only becomes a wrong if it injures his neighbour; and since it is the injury itself which gives rise to the right of action, there can be no right of action unless the damage be of an appreciable amount. . . . In the present case the digging the well and filling it up again were in themselves perfectly lawful acts, and the jury have found that they did no sensible damage to the plaintiff, and he has therefore no right of action."

And a person may by contract be deprived of the right to lateral support. *Murchie v. Black*, 19 C. B., N. S. 190.

In the absence of any deeds appearing to regulate the respective rights of the owner of the surface and the owner of the minerals, it will be presumed that the severance took place in a manner which would confer upon the owner of the surface a right to the support of the minerals. For if the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals without leaving a support for the surface; and, if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the minerals which it had ever before enjoyed. *Humphries v. Brogden*, 12 Q. B. 746.

The simple reservation of minerals in a deed by which the owner of land grants it, reserving the minerals to himself, will not de-

prive the grantee of the surface of the right to the support from the minerals, although it be stipulated that fair compensation is to be made for damage done to the surface and crops thereon. *Harris v. Ryding* 5 M. & W. 60; see also *Roberts v. Haines*, 6 Ell. & Bl. 643, where the question arose under an inclosure act; *Smart v. Morton*, 5 Ell. & Bl. 30.

Upon the same principle, it has been held, in the converse case, that where minerals are demised and the surface retained by the lessor, there arises a *prima facie* inference at common law, that the lessor is demising them in such manner as is consistent with the retention by himself of his own right to support (*Dugdale v. Robertson*, 3 K. & J. 695, 700). And it has been laid down that, in the absence of express words showing distinctly that the owner of the surface has waived or qualified his right, the presumption is, that what he retains is to be enjoyed by him *modo et forma*, as it was before he parted with the subjacent strata. Per Wood, V.-C., in *Dugdale v. Robertson*, 3 K. & J. 700.

In a subsequent case, however, it has been held that the case of a mining lease granted by the owner both of the surface and the minerals is not analogous to that of the reservation of the mines on a conveyance of the surface, and that in the absence of contract the lessor is not entitled to support of the surface. See *Eadon v. Jeffcock*, L.R., 7 Ex. 379. There the lease empowered the lessee to win all the mine, a bed of coal, leaving certain pillars. The lessees worked the mines in the usual course, leaving the specified pillars;

T.L.C.

it was held by the Court of Exchequer, Bramwell dubitante, that the lessees were not liable for a subsidence which injured the lands and buildings of the lessors. See also *Taylor v. Shafto*, 8 B. & S. 228; *Shafto v. Johnson*, 8 B. & S. 252 n. (a); *Dugdale v. Robertson*, 3 K. & J. 695; *Smith v. Darby*, 7 L. R., Q. B. 716.

There is no material difference whether the severance is effected by an ordinary conveyance, or under the compulsory powers of an act of parliament. A conveyance, for instance, of land to a railway company, for the purposes of the line, gives a right by implication to all reasonable subjacent and adjacent support connected with the subject-matter of the conveyance; and, therefore, although in the conveyance to the railway company the minerals are reserved, the grantor is not entitled to work them, even under his own land, in any manner calculated to endanger the railway. *The Caledonian Railway Company v. Sprot*, 2 Macq. H. L. Ca. 449; *North Eastern Railway Company v. Elliott*, 1 J. & H. 145; 2 De G., F. & J. 423; S. C., nom. *Elliott v. North Eastern Railway Company*, 10 H. L. 333; *North Eastern Railway Company v. Crossland*, 2 J. & H. 565; 11 W. R., L. J. 83; *Great Western Railway Company v. Smith*, 2 Ch. D. 235; S. C., Dom. Proc. nom. *Smith v. Great Western Railway Company*, 3 App. Ca. 165.

There may, however, be an express grant or stipulation by which the owner of the surface waives his right to support, and agrees to allow the mines to be so worked as to

P

destroy his property. *Rowbotham v. Wilson*, 6 Ell. & Bl. 593; 8 H. L. Ca. 348; see and consider *Richards v. Harper*, 1 L. R., Ex. 199; *Smith v. Darby*, 7 L. R., Q. B. 716; see also *Duke of Buccleuch v. Wakefield*, 4 L. R., H. L. 399, where, under the words of a special inclosure act, it was held, first, that the lord of the manor was entitled to the mines under the land sold to pay the expenses of the act; and, secondly, that he was entitled to work such mines to the utter destruction of the surface lands above, subject only to the liability to pay for damages. See also *Williams v. Bagnal*, 1 W. N. 392; *Buchanan v. Andrew*, 2 L. R., H. L. Se. 286.

In the absence of express words it may appear by necessary intendment from the contents of the deed that it was not the intention of the parties that there should be any right to support to his surface.

Thus, if it appears that damage to the surface was contemplated by the parties, and that compensation was agreed to be given for it, the right must be implied to do the thing, the power of doing which must have been contemplated by the parties. *Smith v. Darby*, 7 L. R., Q. B. 716.

The question as to the existence of such a contract is a little influenced by the circumstance whether compensation is or is not to be made to the grantee, and of course it is more reasonable to suppose that the parties entered into such a contract if you find that compensation is to be given to the grantee, than where no such compensation is given; and accordingly, on looking at the cases, you will find that where there is no

compensation, the Court has thought that to be a sort of additional presumption in favour of the grantee. That is not a presumption *de jure*, but only that sort of consideration which influences the Court in construing a difficult or an ambiguous instrument, namely, that what is reasonable is likely to have been the intention of the parties. Per Sir G. Jessel, M. R., 10 L. R., Ch. App. 397, n; see also *Hext v. Gill*, 7 L. R., Ch. App. 699; *Aspden v. Seddon*, 10 L. R., Ch. App. 394.

But every private reservation in an act must be read as subject to the public provisoes. Hence, where a special inclosure act reserved in the fullest manner power of working mines under the common, "without paying any damages or making any satisfaction for so doing," it was held that the reservation to the lord of the manor must be taken to be subject to the public right created by the same act to make and maintain a public highway over the lands, and that the assignees of the lord had no right to injure the roads set out in accordance with the act. *The Benfieldside Local Board v. The Consett Iron Company, Limited*, 3 Ex. D. 54.

But where the severance takes place under the provisions of acts of parliament, as in the case of railway and canal acts, the right of support is frequently modified by the provisions therein contained, as in the case of the Railways Clauses Consolidation Act, 1845. Thus, where a railway company, which by agreement with the owner has purchased his land for the purpose of their railway, and taken a conveyance in the form prescribed by the Lands

Clauses Consolidation Act, 1845, and which, after notice pursuant to the 78th section of the Railways Clauses Consolidation Act, 1845, of the owner's intention to work the minerals under the railway, has refused to make him compensation, it is not entitled to the adjacent or subjacent support of the minerals, but the owner is entitled to get them, although the working of them may cause the surface to subside.

Where, however, under such circumstances the company gives notice that the working the mines would destroy the support of the railway, the owner of the minerals will be entitled to recover the compensation which may be assessed under the 78th section. *The Great Western Railway Company v. Fletcher*, 5 H. & N. 689; 4 H. & N. 242. See also *Caledonian Railway Company v. Sprot*, 2 Macq. H. L. Ca. 449; *Caledonian Railway Company v. Lord Belhaven*, 3 Macq. H. L. Ca. 56; *London and North-Western Railway Company v. Aekroyd*, 6 L. T. Rep., N. S. 124; *Reg. v. The Aire and Calder Navigation Company*, 8 Jur., N. S. 115; *Midland Railway Company v. Checkley*, 4 L. R., Eq. 19; *Fletcher v. Great Western Railway Company*, 4 H. & N. 242; 5 H. & N. 689; *Bagnall v. London and North-Western Railway Company*, 7 H. & N. 423; *Great Western Railway Company v. Bennett*, 2 L. R., H. L. 27; *Smith v. Great Western Railway Company*, 3 App. Ca. 165.

As to canal acts, see *The Dudley Canal Company v. Grazebrook*, 1 B. & Ad. 59; *The Stourbridge Navigation Company v. Earl Ward*, 7

Jur., N. S. 329; 30 L. J., Q. B. 108; *Wyrley Canal Company v. Bradley*, 7 East, 368; *Bell v. Wilson*, 2 D. & Sm. 395; 1 L. R., Ch. App. 303; *Birmingham Canal Company v. Earl Dudley*, 7 H. & N. 969; *Whitehouse v. Birmingham Canal Company*, 27 L. J., Ex. 25; *Dunn v. Birmingham Canal Company*, 7 L. R., Q. B. 244; 8 L. R., Q. B. 42; *Boughton v. Midland Great Western Railway Company*, 7 I. R., C. L. 169. As to the meaning of the term "surface" damage, see *Allaway v. Wagstaff*, 4 H. & N. 681. As to the meaning of the term "minerals," see *Bell v. Wilson*, 1 L. R., Ch. App. 303.

After compensation has been agreed on, and obtained or tendered, a perpetual injunction may be granted against the working of the mines. *Smith v. Great Western Railway Company*, 3 App. Ca. 165.

As the easement to destroy the surface may, as we have seen, be acquired by grant, it would seem to follow that it may be acquired by user. *Carlyon v. Lovering*, 1 H. & N. 797; *Rogers v. Taylor*, 1 H. & N. 706. But see *Rowbotham v. Wilson*, 6 E. & B. 593; 8 E. & B. 123; 8 H. L. Ca. 348.

It has been held, however, that the lord of a manor and owner of the mines cannot claim either by prescription or custom a right to work the mines under any land within the manor without making compensation for the damage thereby done to the land, upon the ground that such claim is unreasonable. See *Hilton v. Earl Granville*, 5 Q. B. 701; *Blackett v. Bradley*, 1 B. & S. 940; *Marquis of Salisbury*

v. *Gladstone*, 9 H. L. 702, 705, 709. But see *Wakefield v. Duke of Buccleuch*, 4 L. R., H. L. 399, 410.

Where, under their acts, a waterworks company has power to purchase and divert the *whole* of a stream, and has also given notice to a riparian proprietor that it is their intention to do so, the latter will become entitled, under the 6th section of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), to compensation for the value of the entire stream (*Ferrand v. Corporation of Bradford*, 21 Beav. 412; *Stone v. Corporation of Yeovil*, 2 C. P. D. 99, 107; and see *Girdwood v. The Belfast Water Commissioners*, 1 L. R., Ir. 28, as to whether the purchase of water rights is absolute, or for a limited period); but where, under a similar power, a company gives notice to take only *part* of the stream, he will merely be entitled, under the 68th section of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), to compensation proportioned to the degree in which his land may be affected by such partial abstraction of the water. *Bush v. Trowbridge Waterworks Company*, 19 L. R., Eq. 291; 10 L. R., Ch. App. 459.

An owner of land has no right at common law to the support of subterranean water. Where, therefore, a person, by draining his own land, withdraws from an adjoining owner claiming under the same grantor the support of water theretofore beneath the land of that owner, and thereby causes the surface of that land to subside, he is not liable for the injury inflicted. *Popplewell v. Hodgkinson*, 4 L. R., Ex. 248.

But if a person granted land to another for some special purpose, as, for instance, for building purposes, in accordance with the old maxim that a man cannot do anything on his own land in derogation of his grant, he will not be able, by draining on his own land, to render the land granted less fit for the special purpose than it would otherwise have been. Thus, for instance, if the owners of Chatmoss were to drain it to such an extent as, by the amount of water drawn off, to loosen the foundations of the railway which runs across it, and for the purpose of constructing which they had sold a portion of it to the railway company, that might be an act in derogation of their own grant, and one, therefore, for which they might properly be made responsible. *Popplewell v. Hodgkinson*, 4 L. R., Ex. 252. See also *Siddons v. Short*, 2 C. P. D. 572.

But there is no implied contract on the part of a person who sells lands to a railway company for the purpose of their line, reserving the minerals, that he will not pump water away from the level of an old mine running under the line, and he would consequently not be liable for any damage occasioned by the withdrawal of the hydrostatic pressure. For the principle that a vendor who sells land for a particular purpose cannot derogate from his own grant, will not necessarily extend to a vendor, in the absence of any stipulation for the purpose, to perpetuate an *accidental state of circumstances* in his own land, though existing and of long standing at the date of the sale,

and calculated to further the purpose for which the purchase was made. *North-Eastern Railway Co. v. Elliot*, 1 J. & H. 145; 10 H. L. Ca. 333, nom. *Elliot v. North-Eastern Railway Co.*

Right of Support to Buildings from adjacent Land.

Where a person builds to the utmost extremity of his own land, and thereby increases the lateral pressure on the soil of his neighbour, if the latter digs his own ground, so as to remove some part of the soil, which formed the support of the building so erected, an action will not lie for the injury occasioned to the former (*Wilde v. Minsterley*, 2 Roll. Abr. 564, Trespass, Justification, I. pl. 1; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Partridge v. Scott*, 3 M. & W. 220), unless he has by grant, express or implied, acquired as an easement the right to the support of the house by the soil of his neighbour. Such easement may doubtless be acquired by express grant, as upon the sale and conveyance of land (*Partridge v. Scott*, 3 M. & W. 220; *Metropolitan Board of Works v. Metropolitan Railway Co.*, 4 L. R., C. P. 194), or under the provisions of an act of Parliament (Ib.). There is, however, some conflict of judicial opinion as to the presumption of this easement from enjoyment of the right of support for twenty years or upwards.

In the case of *Stansell v. Jollard*, 1 Selw. N. P. 457, 11th ed., which was an action on the case for digging so near to the gable-end of the house of the plaintiff, let to a tenant, that it fell; Lord Ellenborough

held that where, as in the case before the Court, a man had built to the extremity of his soil, and had enjoyed his building *above twenty years*, upon analogy to the rule as to lights, &c., he had acquired a right to a support, or as it were of leaning to his neighbour's soil, so that his neighbour could not dig so near as to remove the support; but that it was otherwise of a house newly built. See also *Slingsby v. Barnard*, 1 Roll. Rep. 430; *Dodd v. Holme*, 1 A. & E. 493, 505; *Gayford v. Nicholls*, 9 Ex. 708; *Nicklin v. Williams*, 10 Ex. 259; *Hide v. Thornborough*, 2 C. & K. 250; *Rowbotham v. Wilson*, 8 E. & B. 140.

The case, however, of *Stansell v. Jollard* has been doubted. See 4 H. & N. 585; 3 Q. B. D. 115. But in the case of *Angus v. Dalton*, 4 Q. B. D. 162, it has been held by the Court of Appeal (reversing the decision of the majority of the Court of Queen's Bench, reported 3 Q. B. D. 85), that the easement of lateral support to a house from the adjacent soil may be acquired by enjoyment for twenty years, as that would raise, in the absence of evidence to the contrary, the presumption of a lost grant, which would not be rebutted by proof or admission that there was actually no such grant, although it might be rebutted by showing that the owner of the servient tenement was not capable of making such a grant. But that even if such presumption were not rebutted, in order to support the claim to such easement, it is necessary to show that the enjoyment thereof was *open*, because even enjoyment for twenty years gives

only a right to such support as the actual construction of the house, if known to the adjoining owner, required; or to such support as was reasonably required by a house of the dimensions and construction known or apparent to the adjoining owner.

If at the time of severance, buildings were already erected (*Dugdale v. Robertson*, 3 K. & J. 695; *Caledonian Railway Co. v. Sprot*, 2 Macq. H. L. Cas. 449; *Richards v. Rose*, 9 Ex. 218), or if the surface were conveyed for the purpose of erecting buildings or other works (*North-Eastern Railway Company v. Elliot*, 1 J. & H. 145; 2 De G., F. & J. 423; 10 H. L. Ca. 333; *Caledonian Railway Co. v. Sprot*, 2 Macq. H. L. Ca. 449), there would be an implied grant of the right of support for such buildings or works. See *Hunt v. Peake*, Johns. 705.

But where an ancient building, near which an excavation is made, falls in consequence of its infirm condition, that would not be a damage by the act of the neighbour who made the excavation (*Dodd v. Holme*, 1 A. & E. 506); but the result would be otherwise if the neighbour had accelerated its fall, by removing its support, although in the ordinary progress of decay it would have fallen in a short time. *Ib.* 507.

Even where a house is modern, the owner, if he is entitled to support for his soil, can claim compensation for the damage done to his house in consequence of the removal of the support to which he was entitled, if the subsidence of the soil would have taken place, even had no additional weight been laid upon it by building. Ante, p. 208.

Right of Support to Buildings by Buildings.

The right to support for one

building from an adjoining building is not, like the right of one man's land to support from adjoining land, a natural right (*Solomon v. Vintners' Company*, 4 H. & N. 597, 598); and it seems that where two persons build or have houses in close juxtaposition one with another, unless there has been a grant of the right to support one house against the other (*Brown v. Windsor*, 1 Cr. & J. 20), such easement will not be presumed to exist, even in the case of ancient houses, where it does not appear whether they had been erected at the same time or at different times. *Peyton v. The Mayor of London*, 9 B. & C. 725; *Solomon v. Vintners' Company*, 4 H. & N. 585; *Kempston v. Butler*, 12 Ir. C. L. Rep., N. S. 516.

But there will be a presumed grant or presumed reservation of a right to natural support, where several houses belonging to the same owner are built together, so that each requires the mutual support of the neighbouring house, and the owner parts with one of the houses (*Richards v. Rose*, 9 Ex. 218), the legal presumption being, that the owner reserves to himself such right, and at the same time grants to the new owner an equal right (*Ib.*). And consequently, if the same owner parts with several of the houses at different times, the possessors still enjoy the right to mutual support, the right being wholly irrespective of the priority of their titles. *Ib.*

It seems that no right to support from a neighbouring house can be gained by prescription, where houses supposed to have been built by different adjoining landowners, each with its own separate and independent walls, though for upwards of twenty years one of them

got out of the perpendicular, and leaned upon and was supported by the others, so that if the latter were removed the other would fall (per Pollock, C. B., *Solomon v. Vintners' Company*, 4 H. & N. 598). His lordship, however, said that he was embarrassed by *Stansell v. Jollard*, Selw. N.P. 435, and *Hide v. Thornborough*, 2 C. & K. 250, where he said that "*such* right of support is stated to have been gained if the houses had stood for twenty years." In those cases, however, the owner of the houses which had been supported more than twenty years by the land of another proprietor with his knowledge, claimed the right of support from the soil, and not from the houses of his neighbour.

In the case of support claimed from adjacent buildings, even if the houses in respect of which the claim is made have leaned against others, it can scarcely be called an open enjoyment, but an enjoyment *clam*, and consequently not of right. See the remarks of Bramwell, B., in *Solomon v. Vintners' Company*, 4 H. & N. 601—603.

It is clear, however, that the right of support by prescription cannot be claimed as against a house, when there are others between them. *Solomon v. Vintners' Company*, 4 H. & N. 585.

It has indeed been held, that if the pulling down of a house be irregularly and improperly done, and injury produced thereby, the person so acting may be liable for it, although the owner of the house destroyed may not have done all that he ought to have done for his own protection, as by shoring up

his house. See *Walters v. Pfeil*, Mood. & Malk. 362.

The mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall; nor, if he be ignorant of the existence of the adjoining wall, as where it is underground, is he bound to use extraordinary caution in pulling down his own (*Chadwick v. Trower*, 6 Bing. N. C. 1; 8 Scott, 1, in the Court of Exchequer Chamber, reversing the decision of the Court of Common Pleas, 3 Bing. N. C. 334; *S. C.* 3 Scott, 699); a fortiori, if a person gives notice of his intention to pull down his own buildings, he is not bound to use more than reasonable and ordinary care in doing so, nor to secure the adjoining buildings from injury. *Massey v. Goyder*, 4 Car. & P. 161.

The 83rd and 85th sects. of the Metropolitan Buildings Act, 1855 (18 & 19 Vict. c. 122) do not apply to the case of the mere removal of a building from an adjoining building without disturbing the party structure, and no previous notice under the act need, in such case, be given. *Major v. Park Lane Company*, 2 L. R., Eq. 453.

It seems, however, that if the building sought to be removed be so constructed that its supports form part of the party structure which separates the two buildings, such notice previous to removal would be necessary, although it were not the intention of the person removing the building to make use of the party structure in the erection of new buildings. *Ib.*

Legalization of Nuisances.

A person may, in the exercise of his trade or business, by prescription claim the easement of transmitting from his own land to that of his neighbour (2 Bing. N. C. 137; 5 Scott, 506) either smoke or offensive noises, smells or vapours, or water in an impure state, which might otherwise be actionable as nuisances. Vin. Abr. "Nusance," G.; Selw. N. P. 1118, 11th ed.; *Wright v. Williams*, 1 M. & W. 77; *Carlyon v. Lovering*, 1 H. & N. 797; *Stockport Waterworks Company v. Potter*, 7 H. & N. 160; *Crossley v. Lightowler*, 3 L. R., Eq. 279; *Baxendale v. M'Murray*, 2 L. R., Ch. App. 790; 7 Jur., N. S. 880; 31 L. J., Exch. 9.

And it seems that a person might acquire a prescriptive right of draining sewage into a stream. *Goldsmid v. The Tunbridge Wells Improvement Commissioners*, 1 L. R., Ch. App. 349; *Lingwood v. Stowmarket Company*, 1 L. R., Eq. 77, 336.

But such right could only be acquired by draining the sewage into the stream to the injury of the plaintiff, by the continuance of a perceptible amount of injury for twenty years. *Ib.*

The Court will not, however, interfere to restrain by injunction every nuisance. It ought not to do so in cases in which the injury is merely temporary and trifling, but it ought to do so in cases in which the injury is permanent and serious; and in determining whether the injury is serious or not, regard must be had to all the consequences which may flow from it. *The Att.-Gen. v.*

Sheffield Gas Consumers' Company, 3 De G., M. & G. 304.

And although the fact of a prospective nuisance is not in itself a ground for the interference of the Court, yet if some degree of present nuisance exists, the Court will take into account its probable continuance and increase. *Goldsmid v. The Tunbridge Wells Improvement Commissioners*, 1 L. R., Ch. App. 349.

It will be no justification, that the nuisance complained of existed before the plaintiff came into the neighbourhood, and that he in fact came to it, for in all cases a user for twenty years must be shown. See *Elliotson v. Feetham*, 2 Bing. N. C. 134; and *Bliss v. Hall*, 5 Scott, 500, where to a declaration against the defendant for a nuisance in carrying on the business of a candle manufacturer, in messuages contiguous to the plaintiff's messuage, the defendant pleaded that he was possessed of his messuages, and carried on his business therein for the *space of three years* before the plaintiff became possessed of his messuage. It was held, by the Court of Common Pleas, on a general demurrer, that the plea was bad, inasmuch as to legalize the nuisance, a twenty years' user must be averred and proved.

"It clearly is not enough," said Bosanquet, J., "in such a case as this, for the defendant to show a short possession and exercise of the offensive trade, anterior to the commencement of the plaintiff's possession. Nothing less than twenty years' user will afford a defence."

It may be here mentioned that there can be no prescription for a

common nuisance, as for instance to send sewage into a public river (*Att.-Gen. v. Barnsley*, 9 W. N. 37); secus where the nuisance is of a public character merely from being injurious to many persons. See *Rex v. Neville*, Peake, 125.

The Court will not readily, in the absence of express words, construe an act of Parliament as authorizing a nuisance. Thus it has been held that the right to discharge sewage into a stream to the injury of the riparian proprietors is not authorized by the Metropolitan Management Act (*Cator v. Lewisham Board of Works*, 5 Best & Sm. 115), the Local Management Act (*The Queen v. Darlington Local Board of Health*, 5 Best & Sm. 515; 6 Best & Sm. 562), the Towns Improvement Act (*Att.-Gen. v. Council of Borough of Birmingham*, 4 K. & J. 528; *Att.-Gen. v. The Mayor &c., of Kingston-upon-Thames*, 11 Jur., N. S. 596), or the Public Health Act. *Att.-Gen. v. Luton Board of Health*, 2 Jur., N. S. 180; *Manchester, Sheffield, and Lincolnshire Railway Company v. Worksop Board of Health*, 23 Beav. 198; *Aldaker v. Hunt*, 6 De G., Mac. & G. 376; *Spokes v. Banbury Board of Health*, 1 L. R., Eq. 42. See also *Biddulph v. St. George's*, 9 Jur., N. S. 953; *Att.-Gen. v. Proprietors of Bradford Canal*, 2 L. R., Eq. 71; *The Queen v. Bradford Navigation Company*, 6 Best & Sm. 631.

Fences and Party-Walls.

It seems that there may be an easement, by which the owner of the servient tenement is bound to maintain a fence (Dyer, 295, ante,

162; *Lawrence v. Jenkins*, 8 L. R., Q. B. 274; *Barber v. Whiteley*, 34 L. J., Q. B. 212; 13 W. R., Q. B. 774); but it is clear, as laid down by Whitelocke, C. J., in the principal case, that where the adjoining closes, which have once belonged to different persons, one of whom was bound to repair the fences, afterwards become the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. And where the person who has so become the owner of the entirety, afterwards parts with one of the two closes, the obligation will not be revived, unless express words be introduced into the deed of conveyance for that purpose. See *Boyle v. Tamlyn*, 6 B. & C. 329, 337.

As to party-walls generally, see *Matts v. Hawkins*, 5 Taunt. 20; *Cubitt v. Porter*, 8 B. & C. 257; *Wiltshire v. Sidford*, 1 M. & Ry. 404; *Bradbee v. Christ's Hospital*, 4 Man. & Gr. 714, 761; *Colebeck v. Girdlers' Company*, 1 Q. B. D. 234: as to party-walls in the metropolis, see 18 & 19 Vict. c. 122: as to sea-walls, see *Hudson v. Tabor*, 1 Q. B. D. 225.

III. *Incidents of Easements.*

Obligation to repair.

The owner of the dominant tenement, as the easement is for his benefit, is bound to do all necessary repairs, and not the owner of the servient tenement; as, for instance, the scouring out of a watercourse (*Bract. lib. 4, fol. 222*; *Peter v. Daniel*, 5 C. B. 568; and see *Geddis v. Proprietors of Bann Reservoir*,

3 App. Ca. 430), or the reparation of a way (Com. Dig. "Chimin," (D 6); *Pomfret v. Ricroft*, 1 Wms. Saund. 322 a; *Taylor v. Whitehead*, 2 Doug. 745; *Gerrard v. Cooke*, 2 Bos. & Pul. N. R. 109; *Bullard v. Harrison*, 4 Mau. & S. 387; *Duncan v. Louch*, 6 Q. B. 909); it seems, also, of making, erecting, and keeping in repair the necessary gates and fences (*Ingram v. Morecraft*, 33 Beav. 49. See also *Robbins v. Jones*, 15 C. B., N. S. 221); and he has a right to do all things necessary in order to make the repairs, as to enter upon and dig the land on the servient tenement (9 Edw. 4, 35; *Pomfret v. Ricroft*, 1 Wms. Saund. 322 e; *Peter v. Daniel*, 5 C. B. 568; *Beeston v. Weate*, 5 Ell. & Bl. 986); and is in many cases liable for injuries arising from non-repairing. *Bell v. Twentyman*, 1 Q. B. 766; *Lord Egremont v. Pulman*, M. & M. 404; *Hoare v. Dickinson*, 2 Ld. Raym. 1568; *Alston v. Grant*, 3 Ell. & Bl. 128.

Thus if a man has a right to lay down pipes through the land of another, he must keep them watertight and in repair, otherwise he will be liable for the damage arising from his neglect to do so. See *Ingram v. Morecraft*, 33 Beav. 51; *Bell v. Twentyman*, 1 Q. B. 766; *Lord Egremont v. Pulman*, M. & M. 404; *Harrison v. Great Northern Railway Company*, 3 H. & C. 231.

Where there is an easement of a drain, and the level of the sewer into which it falls is lowered, the owner of the dominant tenement may lower the drain so as to accommodate it to the level of the sewer.

Finlinson v. Porter, 10 L. R., Q. B. 188.

The owner, however, of the servient tenement may be bound, either by express stipulation or prescription, to make all repairs. *Taylor v. Whitehead*, 2 Doug. 749; *Rider v. Smith*, 3 T. R. 766.

If a way becomes impassable through want of repairs which ought to have been done by the owner of the land, the owner of the dominant tenement may, it seems, justify his trespass by deviating from the ordinary track (*Anon.*, cited, Sir W. Jones, 296); *secus*, where it is his own duty to make the repairs. *Taylor v. Whitehead*, 2 Doug. 745; *Bullard v. Harrison*, 4 Mau. & S. 387.

Where a right of way has been obstructed by the grantor the grantee has a right to deviate over the grantor's land, and is entitled to have this right protected by the Court of Chancery so long as the obstruction exists, without the necessity of proceeding against the grantor for the removal of the obstruction. *Selby v. Nettlefold*, 9 L. R., Ch. App. 111.

Notice, moreover, of the right of way, and also of the obstruction to it, will be notice to a purchaser from the grantor of the grantee's right of deviation. *Ib.*

In the case of a public way, where the road is foundeours, the public may have a right to deviate and pass over the adjoining lands by prescription (*Duncomb's case*, Cro. Car. 366; 1 Rolle, Abr. 390 (A.) pl. 1; and see *Arnold v. Holbrook*, 8 L. R., Q. B. 98, and cases there cited); or in consequence of the owner of such

adjoining lands having obstructed the way. *Absor v. French*, 2 Show. 28.

Where, however, there is only a limited dedication of a right of way, there will be no right to deviate in consequence of an act done by the owner of the land consistent with such limited dedication. See *Arnold v. Holbrook*, 8 L. R., Q. B. 96. There the plaintiff was the occupier of an arable field, across which was a public footpath, but the plaintiff and his predecessors had the right to plough up the footpath when ploughing the field. The public, when the way was muddy after being ploughed up, having deviated on the plaintiff's field, the plaintiff, in order to prevent them from straying from the line of footpath, placed hurdles on the sides of it, some of which were thrown down by the defendant. It was held by the Court of Queen's Bench that the footpath having been dedicated to the public, with a reservation of the right to plough it up, on its becoming impassable after being ploughed up, the public had no right, in the absence of evidence of such prescriptive right, to pass over the adjoining parts of the plaintiff's field; and that the defendant was liable in an action of trespass. See *Arnold v. Blaker*, 6 L. R., Q. B. 433; *Fisher v. Prowse*, 2 B. & S. 770; 31 L. J., Q. B. 212; *Mercer v. Woodgate*, 5 L. R., Q. B. 26.

Where an easement exists, by which a person is entitled to support or cover from the property of another, as in the case of a house where two different floors belong to different persons (5 Mees. & W.

71), it seems that, except in the case of a custom (Fitz. Nat. Brev. 127, F; Keilw. 98 b), or contract (5 Mees. & W. 71), the owner of the dominant tenement has no right to compel the owner of the servient tenement to repair. *Tenant v. Goldwin*, 1 Salk. 360; 2 Ld. Raym. 1089; and see 1 Wms. Saund. 322, 322 a.

Extent and Mode of Enjoyment of Easements.

As a general rule a person having a right to an easement may use it in such manner as is necessary for its most commodious enjoyment. Thus under a general grant of a free and convenient way for the purpose of carrying coals, it was held, that the grantee had a right to lay a framed waggon-way, although such ways were not in use at the time of the grant. "The question," said Ashhurst, J., "is whether under this general grant for the purpose of carrying coals the grantee has a right to make *any such way* as is necessary for the carrying of that commodity. There are no great collieries in the northern part of the kingdom where they have not those framed waggon-ways. And the case itself expressly states, that the defendant cannot so commodiously enjoy this way in any other manner. Therefore under the original grant, he has a right to make a framed waggon-way along the slip of land in question, which is necessary for the purpose of carrying his coals; it being in the contemplation of the parties at the time of making this grant." *Senhouse v. Christian*, 1 T. R. 560—569. And it seems that under a reservation of "a sufficient

way-leave" to a coal-pit, the right would not be confined to such ways as were in use at the time of the grant, and that the coalowner might have a right to make a railway for the purpose of carrying the coals from the mines for shipment. *Dand v. Kingscote*, 6 Mees. & W. 174; see also *Gerrard v. Cooke*, 2 Bos. & Pul. N. R. 109; *Duncombe v. Randall*, Hetley, 34; *Brown v. Best*, 1 Wils. 174; *Weld v. Hornby*, 7 East, 195; *Rogers v. Taylor*, 2 H. & N. 828; *Lane v. Hone*, 6 I. R., C.L. 231; *Metcalfe v. Westaway*, 13 W. R. (C. P.) 181.

Upon the same principle, where a right of way without limit is annexed to lands, it will not be restricted to the use of the lands in the condition in which they then were, but for the use of the lands in any condition in which they might thereafter be. Thus, where under an act of Parliament level crossings were required to be made by a railway company for the more convenient enjoyment of lands then purely agricultural, the lands having been built upon, it was held that the tenants were entitled to the free use of the level crossings (*United Land Co. v. Great Eastern Railway Co.*, 17 L. R., Eq. 158; 10 L. R., Ch. App. 586).

So where a right of way, by an award under an Inclosure Act, was given in respect of certain allotments to the owners and their respective tenants and farmers, and the owner of one of the allotments having commenced building houses upon it, and began to lay down a metalled road where there had only been an ordinary cart track over the

adjoining allotments, it was held by the Court of Appeal (affirming the decision of Malins, V.-C.) that the allottees were not confined to the use of the road for agricultural purposes only, but were entitled to construct a substantial roadway suitable for the purposes to which the land was now in the course of being applied. *Newcomen v. Coulson*, 5 Ch. D. 133. And see *Selby v. Crystal Palace District Gas Company*, 30 Beav. 606; *Wood v. Stourbridge Railway Company*, 16 C. B., N. S. 222, as to the right to open, for the purpose of conveying gas to houses, roads conveyed for enjoyment as if they were public roads.

The owner, however, of the dominant tenement must not use his right, so as to produce inconvenience or injury to the owner of the servient tenement. *Gerrard v. Cooke*, 2 Bos. & Pul. N. R. 115.

Nor must he extend his enjoyment thereof in such manner as to increase the burden or restriction placed by it on the servient tenement. Thus, under a right of way over a close to a particular place, a person cannot justify going beyond that place. See *Ward v. Lawton*, 1 Ld. Raym. 75, where Powell, J., laid down the distinction that, where the owner of the dominant tenement went farther than his own close to a mill or bridge, he might well do so, but he could not go to another close of his own, "for by the same reason, if he purchased a thousand closes he might go to them all, which would be very prejudicial to the owner of the servient tenement." See also *Hodder v. Holman*, Roll. Abr. "Chimin Pri-

vate," A, pl. 1; *Saunders v. Mose*, Ib. pl. 2, 3; *Stott v. Stott*, 16 East, 343.

So in *Chadwick v. Marsden*, 2 L. R., Ex. 285, where in a lease of certain premises, with their appurtenances, the lessor reserved out of the demise, "the free running of water and soil coming from any other buildings and lands contiguous to the premises thereby demised in and through the sewers and watercourses made or to be made within, through or under the said premises": it was held by the Court of Exchequer, first, that the reservation extended to water and soil coming from the contiguous lands and buildings, whether that water or soil in the first instance actually arose on or from such contiguous lands or buildings or not; and, secondly, that it did not extend beyond water in its natural condition, and such matters as are the product of the ordinary use of land for habitation, and that, therefore, it did not give to the occupier of certain tan pits, who claimed under the lessor, a right of passage for the refuse of those pits. See also *Midgley v. Richmond*, 14 M. & W. 595; *Hedley v. Fenwick*, 3 H. & C. 349.

So in *Wood v. Saunders*, 10 L. R., Ch. App. 582, where there was a grant of a messuage, together with the free running of water in and to an existing cesspool, through the drains, sewers, and watercourses of the grantor; it was held by the Lords Justices, affirming, with a variation, the decree of Hall, V.-C., that the grantee ought to be restrained from allowing the drainage

from additional buildings erected by him to go into the cesspool.

So, likewise, neither the grantee of a way (*Senhouse v. Christian*, 1 T. R. 560; *Cowling v. Higginson*, 4 M. & W. 245; *Colchester v. Roberts*, 4 M. & W. 774; *Dand v. Kingscote*, 6 M. & W. 174), or of a watercourse can divert them into a direction not contemplated by the grant or reservation (*Northam v. Hurley*, 1 Ell. & Bl. 665; *Newby v. Harrison*, 1 J. & H. 393; *Hawkins v. Carbines*, 24 L. J., N. S., Exch. 44). And a grantee of a watercourse as it then stood has no right to alter the levels or enlarge the channel, so as to deprive the grantor of a considerable overflow of water over a weir, the benefit of which he, after heavy rains, had enjoyed for many years. *Taylor v. Corporation of St. Helens*, 6 Ch. D. 264; but see ante, p. 218.

So if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tanyard, the right of way ceases. Per Parke, B., in *Henning v. Burnet*, 8 Exch. 192; and see *Allan v. Gomme*, 11 Ad. & Ell. 759.

In *Henning v. Burnet*, 8 Exch. 187, the plaintiff, being the owner in fee of some land partly built upon, conveyed to the defendant a dwelling-house with coach-house and stable at the back thereof, and a field, together with all ways, easements, &c. to the dwelling-house and field belonging or usually enjoyed therewith, with free liberty of ingress, egress, and regress for the defendant, with cattle and carriages, over the carriage-way and footpath leading to

the said dwelling-houses, coach-houses and stables in the occupation of F. N. and the defendant. Previous to the time of this conveyance, a private road was used for carriages and cattle from the turnpike road to the defendant's coach-house and stable and field, from which road there was a gate into the field. The defendant afterwards pulled down his coach-house and stable, and built a wall across the private road, near their former site (inclosing a portion of the road which had been conveyed to him in fee), and he also opened a gate at the further corner of his field into the private carriage-road, which he used instead of the former gate, and drove carriages and cattle along the road into the field and back again. It was held by the Court of Exchequer, that the defendant was liable in trespass, inasmuch as the grant of all ways to the field belonging or usually enjoyed therewith extended only to the user of the way as it existed at the time of the grant, through the then existing gate, and the express grant was of a right of way to the dwelling-house, coach-house and stable only. See also *The South Metropolitan Company v. Eden*, 16 C. B. 57; *Colechester v. Roberts*, 4 M. & W. 774; *Tobin v. Stowell*, 9 Moo. P. C. C. 79; *Miner v. Gilmour*, 12 Moo. P. C. C. 156; *Northam v. Hurley*, 1 Ell. & Bl. 665.

So where a road had been immemorially used to a farm, not only for agricultural purposes, but in certain instances for carrying building materials to enlarge the farmhouse and rebuild a cottage on the

farm, and for carting away sand and gravel dug out of the farm, it was held by the Lords Justices, affirming the decision of Sir G. Jessel, M. R., that that did not establish a right of way for carting the materials required for building a number of new houses on the land. *Wimbledon & Putney Commons Conservators v. Dixon*, 1 Ch. D. 362.

So likewise user for twenty years of a way to a field for agricultural purposes only does not give a right of way for mineral purposes. *Bradburn v. Morris*, 3 Ch. D. 812.

Where, however, there is no limit in grant of a right of way, it may be used for all purposes. Thus, where a railway company having taken land compulsorily, had contracted to make level crossings, without any restrictions as to their use, the uses that might be made of such crossings by the landowner were held not to be restricted to those made of them at the time of the contract, but to be extended to all such uses as any subsequent alterations on the land by buildings or otherwise might render necessary or convenient. See *United Land Company v. Great Eastern Railway Company*, 17 L. R., Eq. 158; 10 L. R., Ch. App. 586.

Where the proprietors of mineral estates had power if they should find it "expedient or necessary to make any railways or roads over the lands or grounds of any other person or persons," to a canal, it was held by Sir W. Page Wood, V.-C., that a proprietor of such an estate was not restricted to the shortest practicable route, but might adopt

any more circuitous route, which in the bonâ fide exercise of his judgment he might find expedient, and that the saving of time by avoiding a lock, was a sufficient reason for preferring a more circuitous route. *Richards v. Richards*, Johns. 255.

It is a question of fact properly left to a jury, in the case of a trial before one, whether the use of a way was a bonâ fide exercise of the right of way, or a mere colourable use of it, for purposes other than those to which it extended. Thus, in *Williams v. James*, 2 L. R., C. P. 577, the defendant being entitled by immemorial user to a right of way over the plaintiff's land from field N., used the way for the purpose of carting from field N. some hay stacked there, which had been grown partly there and partly on land adjoining. The jury found in effect that the defendant in so doing had used the way bonâ fide, and for the ordinary and reasonable use of field N. as a field. It was held by the Court of Common Pleas that the mere fact that some of the hay had not been grown on field N. did not make the carrying of it over the plaintiff's land an excess in the user of the right of way. See also *Skull v. Glenister*, 16 C. B., N. S. 81; 33 L. J., C. P. 185.

The owner of ancient lights, that is, the owner of the dominant tenement, cannot depart substantially from the mode of user, as by changing the position of his lights, or increasing the original apertures into which the windows have been put (*Turner v. Spooner*, 1 Drew. & Sm. 473); but he may acquire an increased access of light and air by

substituting for the old window-frames and glass others of an improved construction. *Turner v. Spooner*, 1 Drew. & Sm. 467.

As to the effect of alterations in the dominant tenement on an easement, see post, p. 233.

The owner of the servient tenement must do no act which will interfere with the rights of the owner of the dominant tenement, as by obstructing a way (2 Roll. Abr. "Nusans," G, pl. 1; *James v. Hayward*, Sir W. Jones' Rep. 221; *Phillips v. Treeby*, 3 Giff. 632), or a stream (*Bower v. Hill*, 1 Bing. N. C. 555; *Northam v. Hurley*, 1 E. & B. 665), or diverting underground water from wells contrary to a grant. *Whitehead v. Parks*, 2 H. & N. 870.

And it seems that the growth of the roots and branches of trees standing on the soil of the servient tenement, so as to obstruct a water-course, may be considered the act of the owner. *Hall v. Swift*, 6 Scott, 167.

The owner, however, of the servient tenement may do anything thereon which does not substantially interfere with the easement. Thus, where there is a way of necessity, he may erect a building thereon, provided there remains, after the erection, such a way as the owner of the dominant tenement would have been entitled to the day after the lease creating the way was executed. *Gayford v. Moffatt*, 4 Ch. App. 133, 136.

So it has been held that he may erect a *porte cochère* over a road on which the owner of the dominant tenement has a right of way, provided there be no substantial interference with the right, although the

erection may encroach a little upon the road (*Clifford v. Hoare*, 9 L. R., C. P. 362). If, however, there had been a grant of the road itself, any interference with its enjoyment would have given a right to an action. *Ib.* p. 371, per Brett, J.

IV. *Disturbance of Easements, and the Remedies in respect thereof.*

Where there is a disturbance in the enjoyment of an easement, as, for instance, by the owner of the servient tenement making buildings or erections on his own soil, or otherwise stopping up a watercourse or a way, or obstructing ancient lights, the owner of the dominant tenement may either proceed at law, or enter upon the land on which the nuisance exists, and at once abate it (*Bro. Abr. "Nusans,"* 105 b, pl. 33; 8 Ed. 4, 5; 2 Roll. Abr. "Nusans" (S), (W); *Wigford v. Gill*, Cro. Eliz. 269; *Rex v. Rosewell*, Salk. 459; *Raikes v. Townsend*, 2 Smith, 9); nor is any request to the owner of the servient tenement to abate the nuisance requisite, except when he has become the owner, after the erection of the nuisance (*Penruddock's Case*, 5 Co. 100 b; *Jones v. Williams*, 11 M. & W. 176). And in abating a nuisance, reasonable care should be taken to do no more damage than is necessary for that purpose (*Perry v. Fitzhove*, 11 Q. B. 757; *Davies v. Williams*, 16 Q. B. 556); but the wrongdoer, rather than an innocent party or the public, ought to suffer thereby. Thus where the owner of land gives another licence to use a watercourse, which is afterwards revoked, but

the licensee refuses to discontinue the use thereof, so that it becomes a nuisance, the owner of the land may abate the nuisance by obstructing it; and he may enter upon the land of the licensee for that purpose, if by resorting to any other method some wrong would be done to an innocent third party or the public. *Roberts v. Rose*, 1 L. R., Ex. (Ex. C.) 82.

An action may be commenced by the party in possession of the dominant tenement against any interference with its enjoyment, although such interference may be of a temporary character. A reversioner also may have an action for such interference, if it may operate injuriously to the reversion, either by its being of a permanent character, or by its operating in denial of his right. *Metropolitan Association v. Petch*, 5 C. B., N. S. 504; *Bell v. Midland Railway Company*, 10 C. B., N. S. 287.

Proceedings may now be taken under the Judicature Acts in an action in any division of the High Court of Justice for a disturbance of an easement, either for damages in addition to, or in substitution for, an injunction. 21 & 22 Vict. c. 27, s. 2; 6 Ch. D. 761.

An injunction may be granted either upon an interlocutory application, or at the hearing against the commission of any wrongful act in the disturbance of an easement. See *Cannon v. Villars*, 8 Ch. D. 415, where there was an injunction granted to restrain an obstruction by vehicles to a right of way.

In cases relating to the abstraction of light, in order to support an

action or warrant an injunction, it is necessary for the plaintiff to show that there will be a permanent obstruction to the access of light to such an extent as to render the occupation of his house less comfortable than it was before, or to prevent the tenant from carrying on his business as beneficially as he could before, or that the owner of the reversion will suffer substantial or material damages by the lessening of its value. *Kino v. Rudkin*, 6 Ch. D. 165. See also *Kelk v. Pearson*, 6 L. R., Ch. App. 809; *City of London Brewery Company v. Tennant*, 9 L. R., Ch. App. 216; *Stokes v. Cities Offices Company*, 11 Jur., N. S. 560; *Back v. Stacey*, 2 C. & P. 465; *Parker v. Smith*, 5 C. & P. 438; *Cotterell v. Griffiths*, 4 Esp. N. P. C. 69; *Wells v. Ody*, 7 C. & P. 410; *Johnson v. Wyatt*, 2 De G., J. & S. 18; *Dent v. Auction Mart Company*, 2 L. R., Eq. 245; *Culcraft v. Thompson*, 15 W. R. 387; *Maguire v. Grattan*, 2 Ir. R., Eq. 246.

If the damage is only slight the Court will not interfere. *Jacomb v. Knight*, 9 Jur., N. S. 529; 32 L. J., Ch. 601; *Johnson v. Wyatt*, 2 De G., J. & S. 18; *Clarke v. Clark*, 1 L. R., Ch. App. 16; *Robson v. Whittingham*, Ib. 442; *City of London Brewery Company v. Tennant*, 9 L. R., Ch. App. 212; *Radcliffe v. Duke of Portland*, 3 Giff. 702.

There is no positive rule that where forty-five degrees are left unobstructed, that lights cannot be considered as unduly interfered with (see *City of London Brewery*

Company v. Tennant, 9 L. R., Ch. App. 220). But if the buildings to be erected opposite to the lights have not a greater angular elevation than forty-five degrees, the fact that forty-five degrees of sky are left unobstructed may, under ordinary circumstances, be considered as *prima facie* evidence that there is not likely to be material injury. Ib. *Sed vide Bradel v. Perry*, 3 L. R., Eq. 467; *Hackett v. Baiss*, 20 L. R., Eq. 494, and the observations thereon in *Theed v. Debenham*, 2 Ch. D. 165, 170.

The statutory regulations, however, as to the height of buildings in streets is not to be taken as limiting the right by prescription to ancient lights, inasmuch as such right depends upon the degree and amount of obscuration in each particular case. *Theed v. Debenham*, 2 Ch. D. 165.

In *Hackett v. Baiss*, 20 L. R., Eq. 494, where a building was being erected in a somewhat narrow street in the City of London, and had already reached a height which would subtend an angle of forty-five degrees at the foot of the ancient lights of the plaintiff's houses on the opposite side of the street, it was held that the plaintiff was entitled to an injunction restraining the raising of the new building to a greater height. See observations in *Theed v. Debenham*, 2 Ch. D. 165.

A greater amount of evidence is needed to prove a material injury to light by lateral or oblique obstruction than is necessary in a case of direct obstruction, and that more especially when the buildings to

the side are not erected upon what was previously an open space, but upon a space already, to a very great extent, obstructed by buildings, even although they were of a less height. *City of London Brewery Company v. Tennant*, 9 L. R., Ch. App. 220; and see *Clarke v. Clark*, 1 L. R., Ch. App. 16.

An interlocutory injunction is sometimes granted upon terms of the plaintiff undertaking to abide by any order the Court might make as to damages, in case the Court should thereafter be of opinion that the defendant should have sustained any by reason of the order for the injunction; and upon the plaintiff failing to substantiate his case, will direct an inquiry as to damages. *Kino v. Rudkin*, 6 Ch. D. 160, 162, 165.

An inquiry as to damages may also be directed in a proper case at the suit of a reversioner. *Curriers' Company v. Corbett*, 2 Dr. & Sm. 355.

But it will not be directed where the plaintiff, as occupant or reversioner, has opened a case of substantial damage, and has failed to prove it. *Kino v. Rudkin*, 6 Ch. D. 160, 164; *Robson v. Whittingham*, 1 L. R., Ch. 442.

The fact that a plaintiff claiming in respect of ancient lights has enlarged or added to the number of windows will not preclude him from obtaining an injunction, or induce the Court to require him to bring back his windows to their old size as a condition of obtaining the injunction. *Aynsley v. Glover*, 10 L. R., Ch. App. 283; 18 L. R., Eq. 544, overruling *Heath v. Bucknall*,

8 L. R., Eq. 1, and partially *Staight v. Burn*, 5 L. R., Ch. App. 163.

Where ancient lights are obstructed, the fact that the owner of the building to which the ancient lights belong has himself contributed to the diminution of the light, will not in itself preclude him from obtaining an injunction against the person causing the obstruction. *Staight v. Burn*, 5 L. R., Ch. App. 163.

The principle laid down by *Tapling v. Jones*, 11 H. L. Ca. 290, is plain, that opening a new window, or the enlargement of an old window in the wall of your house, is no injury or wrong at all to your neighbour: that it is one of the natural rights of property which any man is entitled to exercise, and he cannot, by exercising that right, lose any other right which he may have acquired.

If, therefore, a man having got a right to the entry of light into a window of a certain size, he does not, by making that window larger, lose his right to the entry of light to the old part of it. Per Mellish, L. J., in *Aynsley v. Glover*, 10 L. R., Ch. App. 285; see *National and Provincial Plate Glass Insurance Company v. Prudential Assurance Company*, 6 Ch. D. 757.

A mandatory injunction may also be granted, that is, an order directing the removal of a building, so far as it improperly obstructs an easement, as a right of way (*Krehl v. Burrell*, 7 Ch. D. 551), or ancient lights (*Kelk v. Pearson*, 6 L. R., Ch. App. 809; *City of London Brewery Company v. Tennant*, 9 L. R., Ch.

App. 219, the observations there on *Durell v. Pritchard*, 1 L. R., Ch. App. 244; *Beadel v. Perry*, 3 L. R., Eq. 465; and it does not seem to be essential that a case for a mandatory injunction should be made as to the whole of the building. *City of London Brewery Company v. Tennant*, 9 L. R., Ch. App. 218.

And a mandatory injunction directing the removal of a building may, in the absence of improper delay or acquiescence on the part of the plaintiff (*Smith v. Smith*, 20 L. R., Eq. 500), be granted, although the building be completed before the commencement of the action. See *City of London Brewery Company v. Tennant*, 9 L. R., Ch. App. 219.

And although, in a case where a building injuriously affecting ancient lights has been completed before proceedings have been taken, the Court may not consider itself justified in granting a mandatory injunction, it may nevertheless grant relief in damages. *City of London Brewery Company v. Tennant*, 9 L. R., Ch. App. 212, 218, commenting on *Durell v. Pritchard*, 1 L. R., Ch. App. 244; *Lady Stanley of Alderley v. Earl of Shrewsbury*, 19 L. R., Eq. 616; see also *Isenberg v. East India House Company*, 3 De G., J. & S. 263.

In determining whether an injunction or damages should be granted, the fact that the building was completed before the injunction was asked may give rise to a question whether an injunction should be granted (*National and Provincial Plate Glass Insurance Company v. Prudential Assurance Company*, 6

Ch. D. 761; *Curriers' Company v. Corbett*, 2 Dr. & Sm. 360; and see *Martin v. Headon*, 2 L. R., Eq. 425), as a person may by his laches and acquiescence disentitle himself to relief. See *Wicks v. Hunt*, John. 372; *Wood v. Sutcliffe*, 2 Sim., N. S. 167; see also and consider *Isenberg v. East India Estate Company*, 33 L. J., Ch. 392; 10 Jur., N. S. 221; *Lady Stanley of Alderley v. Earl of Shrewsbury*, 19 L. R., Eq. 616; *Gaunt v. Fynney*, 8 L. R., Ch. App. 14; *sed vide Imperial Gas Company v. Broadbent*, 7 H. L. Ca. 600; *Turner v. Mirfield*, 34 Beav. 390.

There is another consideration which ought to have weight, and that is the comparative injury caused in point of value and damage to each party as regards the removing of the obstruction that is destroying the new building, with a view to restore the enjoyment of the light. *National and Provincial Plate Glass Insurance Company v. Prudential Assurance Company*, 6 Ch. D. 757, 762.

If comparatively little injury would be done to the defendants by the destruction of the new building a mandatory injunction ordering its removal will be granted. *Ib.*

If, on the other hand, the injury done by such removal would be out of all comparison great as compared with the injury done by the new buildings to the lights, the injunction will be refused. *Ib.*

Under special circumstances a mandatory injunction may be granted on motion before the hearing. *Hervey v. Smith*, 1 K. & J. 328; *Beadel v. Perry*, 3 L. R., Eq. 465; *Westminster Brymbo Coal*

Company v. Clayton, 36 L. J., Ch. 476.

And sometimes when the injunction is refused upon an interlocutory application the defendants will be required to give an undertaking to pull down anything they may build. See 6 Ch. D. 762.

The Court, however, will not, it seems, in the case of water rights award damages in lieu of an injunction, as it will do in the case of an injury done to rights of light. See *Clowes v. Staffordshire Potteries Waterworks Company*, 8 L. R., Ch. App. 125, in which the point was considered by Lord Justice Mellish; and although he was of opinion that in that case the plaintiff could only have recovered nominal damages, he nevertheless held, that an injunction ought to issue upon the ground of the impropriety of leaving the parties to repeated and successive actions in which only small damages could be recovered.

But when there is evidence before the Court which shows that the damage accruing to the plaintiffs is by no means inconsiderable, there may in addition to an injunction be a reference for damages. *Pennington v. Brinsop Hall Coal Company*, 5 Ch. D. 769.

Where the owner of land sells it, reserving to himself, his heirs and assigns, the minerals under the land, and the right to work them, paying compensation for all damage that should be done thereby to the erections on the land, the grantees of the minerals with notice of the reservation can only work the minerals subject to the condition of paying compensation to the grantee

of the land, who can maintain an action for the damage done to his buildings by the working of the mines. See *Aspden v. Seddon*, 1 Ex. D. 496; see and consider *S. C.* 10 L. R., Ch. App. 394.

Although by part of a building scheme a benefit is conferred upon a plaintiff complaining of injury to his ancient lights, the Court will not be at liberty to hold the injury compensated for by the benefit; yet, in deciding the question of damages or injunction, the Court will be at liberty to consider it as one element which has to influence its decision in deciding which of the two alternatives it will adopt. Per Fry, J., in *National and Provincial Plate Glass Insurance Company v. Prudential Assurance Company*, 6 Ch. D. 757, 769.

It is only in very rare and special cases, involving danger to health, or something very nearly approaching it, that the Court would be justified in interfering on the ground of diminution of air. Per Lord Selborne, C., in *City of London Brewery v. Tennant*, 9 L. R., Ch. App. 221.

An easement is an interest in land, for the invasion of which compensation may be claimed under the Lands Clauses Consolidation Act, 1849 (8 & 9 Vict. c. 18, s. 6). Thus, if the works of a company interfere with the plaintiff's right of way to his premises, whether by raising or lowering a road (*Reg. v. Eastern Counties Railway*, 2 Q. B. 347; *Glover v. North Staffordshire Railway Company*, 16 Q. B. 912; 20 L. J., Q. B. 376; and see *Reg. v. Great Northern Railway Company*, 14 Q. B. 25; *Re Cooling* and

The Great Northern Railway Company, 19 L. J., Q. B. 25), or obstruct the access of light thereto (*Eagle v. Charing Cross Railway Company*, 2 L. R., C. P. 638), it is clearly a case for compensation. Although that would not be the case where damage to the plaintiff's trade was caused by the obstruction of access to his premises by a public highway. See *Ricket v. Metropolitan Railway Company*, 5 B. & S. 149; in Exch. Ch., 5 B. & S. 156; 2 L. R., H. L. 175.

And where the easement is injuriously affected, as, for instance, that of a right to light, in a manner which entitles the owner of the dominant tenement to compensation under the statute, it will be no answer that by reason of accidental circumstances the saleable value of the premises was not diminished. *Eagle v. Charing Cross Railway Company*, 2 L. R., C. P. 638.

Easements are not affected by the Metropolitan Buildings Acts. *Wells v. Ody*, 1 M. & W. 452; *Titterton v. Conyers*, 5 Taunt. 465; *Crofts v. Haldane*, 2 L. R., Q. B. 194; and see *Weston v. Arnold*, 8 L. R., Ch. App. 1084.

When an easement of light (*Duke of Bedford v. Dawson*, 20 L. R., Eq. 353; *Eagle v. Charing Cross Railway Company*, 2 L. R., C. P. 638), or for a foundation (*Knapp v. London, Chatham and Dover Railway Company*, 2 H. & C. 212), is injuriously affected under the powers of a railway act, although the owner of the dominant tenement is entitled to compensation under sect. 6 of the Lands Clauses Act, he is not entitled to notice to treat. See *Clark*

v. London School Board, 9 L. R., Ch. App. 120; *Bush v. Trowbridge Waterworks Company*, 19 L. R., Eq. 291; 10 L. R., Ch. App. 459.

Where, however, the act gives the railway company no power to disturb the easement, the owner's remedy will be not by way of compensation but by action. *Turner v. Sheffield and Rotheram Railway Company*, 10 M. & W. 425.

But where a party is entitled by contract to a private right of way to his premises, as for instance over a railway, an act of Parliament extinguishing rights of way over the railway, will, if no compensation be given in respect of the private right of way, be held to apply to public rights of footway only. *Wells v. London, Tilbury and Southend Railway Company*, 5 Ch. D. 126.

A school board, taking lands under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75, ss. 19 and 20), need not give notice to treat to the owners of easements over the land taken; but compensation in respect of such easements is to be given as for lands injuriously affected. See *Clark v. School Board for London*, 9 L. R., Ch. App. 120; and see *Macey v. Metropolitan Board of Works*, 33 L. J., Ch. 377; 10 Jur., N. S. 333.

A lessee of premises with an undisclosed right of way may take proceedings for relief against the party claiming the right of way, and also against the lessor, asking in the alternative, if the right be established, an indemnity and damages against his lessor under his covenant for quiet enjoyment.

Child v. Stenning, 5 Ch. D. 695; 7 Ch. D. 413.

clear. *Wilson v. Hornsby*, 3 Ir. R., C. L. 52.

V. *The Extinguishment of Easements.*

An easement may be extinguished —1. By express release under seal; 2. By act of parliament; 3. By merger in consequence of the unity of seisin or ownership of the dominant and servient tenement; 4. By the licence from the owner of the dominant tenement to do some act which of necessity destroys the easement; 5. By the abandonment of the enjoyment by non-user; 6. By extinction of the dominant tenement, or the non-existence of the purpose for which the easement was granted.

1. *Extinguishment of Easements by express Release under Seal.*

It is obvious that an easement may be extinguished by release under seal (see Co. Litt. 264 b); it might also always in Equity, which by the Judicature Acts is now prevalent, be also modified or extinguished by agreement (*Waterlow v. Bacon*, 2 L. R., Eq. 514; *Fisher v. Moon*, 11 L. T., N. S. 623), or acquiescence. *Davies v. Marshall*, 10 C. B., N. S. 697; *Salaman v. Glover*, 20 L. R., Eq. 444; *Johnson v. Wyatt*, 9 Jur., N. S. 1333, 1334.

2. *Extinguishment of Easements by Act of Parliament.*

Easements may be extinguished by act of parliament, as for instance by the General Inclosure Act (41 Geo. 4, c. 109, s. 8; and see *Race v. Ward*, 7 Ell. & Bl. 384); but the intention to do so must be

3. *Extinguishment of Easements by Unity of Possession.*

Where there is a unity of seisin or ownership of the dominant and servient tenement, from which possession will be implied, as we have before shown, the easement will be extinguished (ante, p. 173), although on a severance of the property, a grant of those easements which are continuous and apparent, or which are of necessity, will be implied. Ante, pp. 173 *et seq.*

So the owner may on a severance revive an easement by an express grant, but this may more properly be called a new easement.

But where the estates in the dominant and servient tenement are not perdurable, merger or extinguishment will not take place; there will be merely a suspension of the easement during the unity of possession. "If," observes Alderson, B., "I am seised of freehold premises, and possessed of leasehold premises adjoining, and there has formerly been an easement enjoyed by the occupiers of the one as against the occupiers of the other, while the premises are in my hands the easement is necessarily suspended, but it is not extinguished, because there is no unity of seisin, and if I part with the premises, the right, not being extinguished, will revive." *Thomas v. Thomas*, 1 Cr., M. & R. 41; see also *Rex v. The Inhabitants of Hermitage*, Carth. 239; *Canham v. Fisk*, 2 Cr. & J. 126; *James v. Plant*, 4 Ad. & Ell. 766; *War-*

burton v. Parke, 2 H. & N. 64; *Simper v. Foley*, 2 J. & Hem. 555, 563.

But where a right to an easement, such as that of ancient lights, is acquired against the owner of a leasehold interest in the servient tenement, it is acquired also against all the world, and therefore against the owner of the reversion; consequently by the merger of the leasehold interest in the reversion of the servient tenement, the rights of the owner of the dominant tenement remain unaltered. *Simper v. Foley*, 2 J. & H. 555, 564.

4. *Extinguishment of Easement by act done by leave of the Owner of the Dominant Tenement.*

Where the owner of the dominant tenement authorizes the owner of the servient tenement, although only by parol, to do some act thereon, the effect of which will be to prevent the future enjoyment of the easement, it will be extinguished. See ante, p. 173; and *Liggins v. Inge*, 7 Bing. 682; *Webb v. Paternoster*, Palm. 71; 2 Roll. Rep. 152; *Winter v. Brockwell*, 8 East, 308.

5. *Extinguishment of Easement by Abandonment or Non-user, and herein as to the effect of alterations in the Dominant Tenement.*

An easement will be extinguished by a voluntary abandonment or cessation to enjoy it. As where a person having a mill, pulls it down with the intention of not returning, the owner of the adjoining land might, it is presumed, erect a mill and employ the water so relin-

quished, and would not be compellable to pull down his mill, if the owner of the former should afterwards change his determination, and wish to rebuild his own. See dictum of Tindal, C. J., in *Liggins v. Inge*, 7 Bing. 693; *Luttrell's Case*, 4 Co. 86.

Upon the same principle it has been held that where an ancient window had been shut up for twenty years with brick and mortar, it lost its privilege as an easement, and was as if it had never existed. *Lawrence v. Obee*, 3 Camp. 514.

Although the mere suspension of the exercise of a right to foul water is not sufficient to destroy the right, evidence of an intention to abandon it may have that effect. Thus, in *Crossley & Sons, Limited v. Lightowler*, 2 L. R., Ch. App. 478, where dye works had not been used for more than twenty years, and had been allowed to go to ruin, it was held by the Lord Chelmsford, L. C., affirming the decision of Wood, V. C. (reported 2 L. R., Eq. 279), that any right of fouling the stream attached to them was lost. See also *Norbury v. Meade*, 3 Bligh, 241; *Harvie v. Rogers*, 3 Bligh, N. S. 447.

The result would be the same upon the non-user of light for a less period than twenty years, if it appears to have been the intention permanently to abandon the right to it. Thus, in *Moore v. Rawson*, 3 B. & C. 332, the plaintiff's messuage was an ancient house, having had formerly adjoining to it a building, in which there was an ancient window, next the lands of the defendant; a former owner of the

plaintiff's premises, about seventeen years before, had pulled down that building, and erected on its site another with a blank wall, next adjoining the premises of the defendant, who, about three years before the commencement of the action, erected a building next the blank wall of the plaintiff, who then opened a window in that wall in the same place where the ancient window had been in the old building; it was held by the Court of King's Bench, that he could not maintain any action against the defendant for obstructing the new window, because by erecting the blank wall, he not only ceased to enjoy the light, but had evinced an intention never to resume the enjoyment. See also *Cook v. Mayor of Bath*, 6 L. R., Eq. 177, as to whether a right of way had been abandoned.

An abandonment of an easement is effectual if a communication of it be made to the owner of the servient tenement and he acts upon it. *The Queen v. Chorley*, 12 Q. B. 515; *Stokoe v. Singers*, 8 E. & B. 31.

A mere temporary abandonment of the enjoyment of an easement will not destroy the right, but the *onus* lies upon the party discontinuing the enjoyment, of showing that he intended to resume it within a reasonable period. If, for instance, in the case of *Moore v. Rawson*, 3 B. & S. 332, the person who had pulled down the old house had shown an intention to rebuild it in the same manner, within a reasonable time, and not an entirely different one with a blank wall, he would not have destroyed his right.

See 3 B. & C. 337, 338; *Weston v. Arnold*, 8 L. R., Ch. App. 1084.

In *Hale v. Oldroyd*, 14 M. & W. 789, the plaintiff had enjoyed an immemorial right to the flow of water into an ancient pond in one of his closes, but above thirty years before, he made a new pond in three different closes, and turned the water so as to supply them, and thenceforth disused the old pond, which was gradually filled with rubbish and overgrown with grass. The plaintiff's right in respect of the three ponds having been defeated by proof of an outstanding life estate under 2 & 3 Will. 4, c. 71, s. 7, it was held by the Court of Exchequer, that the plaintiff was entitled to recover in respect of his right to the flow of water to the old pond. "The use of the old pond," said Parke, B., "was discontinued only because the plaintiff obtained the same or greater advantage from the use of the three new ones. He did not thereby abandon his right, he only exercised it in a different spot, and a substitution of that nature is not an abandonment."

So where the owner of the dominant tenement in an insignificant degree obscured the light and air of his own dwelling, it was held that this did not justify the owner of the servient tenement in seriously diminishing the supply of light and air. *Arcedeckne v. Kelk*, 2 Giff. 683.

With regard to easements of an intermittent nature;—although the law has not fixed any period of prescription for them, it appears at one time to have been thought that as a grant would be presumed after

twenty years' user, so a release would be presumed after non-user for the same period. That if, for instance, A. had ceased to use a right of way over B.'s land for twenty years, a presumption would arise that he had released such right of way (*Doe v. Hilder*, 2 B. & Ald. 791; *Moore v. Rawson*, 3 B. & C. 339). It has, however, been held, that the mere non-user of a right of way, even for more than twenty years, will not raise a presumption of abandonment. *Ward v. Ward*, 7 Exch. 838.

Presumption of a dedication of a right of way to the public will be raised by evidence of user (*The Greenwich Board of Works v. Maudsley*, 5 L. R., Q. B. 397; *The Queen v. The Inhabitants of the Township of Bradfield*, 9 L. R., Q. B. 552); and there is nothing inconsistent with the purposes of a sea or river-wall or embankment erected to protect the neighbouring lands, in a right of way along the surface. *Ib.*

As to the effect of a dedication of way to the public, see *The Vestry of St. Mary, Newington v. Jacobs*, 7 L. R., Q. B. 47.

The presumption of a dedication can only be made in favour of the public, and not of the inhabitants of a particular parish. *Vestry of Bermondsey v. Brown*, 1 L. R., Eq. 204; *Reilly v. Thompson*, 11 L. R., C. L. 238.

As to the circumstances which will amount to an interruption sufficient to prevent a public right being acquired by user, see *Healey v. Corporation of Batley*, 19 L. R., Eq. 375, and cases there cited.

The public will not by non-user release their rights to a way once dedicated to them. *Daves v. Hawkins*, 8 C. B., N. S. 848.

An abandonment of a prescriptive easement will not, at any rate in a court of law, be held to have taken place without a deed, or evidence from which the jury can presume a release of such easement. See *Lovell v. Smith*, 3 C. B., N. S. 120. There the plaintiff having a right of way by prescription more than twenty years before action brought, agreed with the owner and occupier of the servient tenement that the use of a portion of that way should be discontinued, and a new way equally convenient to him should be substituted for it. It was held by the Court of Common Pleas that a consequent discontinuance of the use of the old way afforded no evidence of an abandonment thereof. See *Race v. Ward*, 7 Ell. & Bl. 384; see, however, *Mulville v. Fallon*, 6 L. R., Eq. 458.

Where Alterations in the Dominant Tenement extinguish an Easement.

Where there has not been an abandonment of an easement, but mere alterations have been made in the dominant tenement, as to the mode of enjoying it, questions of difficulty arise as to what effect they have upon the easement. It seems, as a general rule, that the owner of the dominant tenement cannot impose any additional restriction or burden upon the owner of the servient tenement. If, however, the additional restriction or burden can be ascertained, and separated from

the easement, it will still remain unimpaired.

Thus "if a party having a right of footway were to use it for other purposes, although he might be liable to an action for trespass, he might, nevertheless, sustain an action for any disturbance of his footway; the right thus sought to be usurped would, in the mode of its enjoyment, be altogether distinct from the previous easement." Gale, 598, 5th ed.

Where the owner of the dominant tenement makes alterations in ancient windows, he will not entirely lose the right which he before enjoyed, of having light and air through such portions of the present windows as formed portions of the ancient windows before the alteration.

For although the acquired right to the easement of light is confined to the exact dimensions of the openings through which the access of light and air has been permitted (see *Tapling v. Jones*, 11 H. L. 318), the owner of windows so privileged does nothing unlawful if he enlarges them, or makes a new window in a different situation. The adjoining owner, however, is at liberty to build upon his own ground so as to obstruct the addition to the old windows, or to shut out the new one; but he does not acquire his former right of obstructing the old windows, which he lost by acquiescence, nor does the owner of the old windows lose his absolute and indefeasible right to them, which he had gained by length of user. *Tapling v. Jones*, 11 H. L. 290, 306, 319.

A party by endeavouring to ex-

tend a right, instead of manifesting an intention of abandoning it, evinces his determination to retain it and acquire something more; and the enlarging of an ancient window could be no cause of forfeiture, because the act was not unlawful. *Tapling v. Jones*, 11 H. L. 307, 314, 319, 320.

In some cases, at variance with *Tapling v. Jones* and older authorities (*Chandler v. Thompson*, 3 Campb. 80; *Martin v. Goble*, 1 Campb. 322; *Garritt v. Sharp*, 3 Ad. & Ell. 325; *S. C.* 4 Nev. & Man. 834), it has been held that where the owner of the dominant tenement has exceeded the limits of his admitted right to the access of light and air, either by enlarging or altering (*Renshaw v. Bean*, 18 Q. B. 112, and the remarks thereon in *Wilson v. Townend*, 1 Drew. & Sm. 324, 330; *Hutchinson v. Copestake*, 8 C. B., N. S. 102; 9 C. B., N. S. 863) ancient windows or opening new ones (*Binekes v. Pash*, 11 C. B., N. S. 324; *Blanchard v. Bridges*, 4 Ad. & Ell. 176; *S. C.* 5 Nev. & Man. 567; *Cherrington v. Abney*, 2 Vern. 646), and has thereby put himself in such a position that the excess cannot be obstructed by the owner of the servient tenement without at the same time obstructing the admitted right, no action can be maintained for obstructing the latter, because it was unavoidably caused by the exercise of the right of the owner of the servient tenement to obstruct the excess. *Renshaw v. Bean*, 18 Q. B., 112; *Davies v. Marshall*, 1 Drew. & Sm. 561.

Moreover, Lord Campbell, in the case of *Renshaw v. Bean*, 18 Q. B.

130, expressly lays it down, that in the case where the owner of the servient tenement has obstructed ancient lights which have been altered, that the owner of the dominant tenement "must be considered to lose the former rights which he had at all events *until* he shall by himself doing away with the excess, and restoring his windows to their former state, throw upon the defendant the necessity of so arranging his buildings as not to interfere with the admitted right."

It has, however, been since clearly settled that although the owner of the dominant tenement has enlarged old windows and made new ones, the owner of the servient tenement has no right to obstruct the ancient passage of light, although it was impossible for him to obstruct the access of light to the new windows without doing so. Nor is it necessary as a condition to his obtaining relief against such obstruction that he should restore his windows to their original state. See *Jones v. Tapling*, 11 C. B., N. S. 283; 12 C. B., N. S. 826; 11 H. L. Ca. 290, nom. *Tapling v. Jones*, *Martin v. Headon*, 2 L. R., Eq. 425; *Staight v. Burn*, 5 L. R., Ch. App. 163; *Aynsley v. Glover*, 18 L. R., Eq. 547; 10 L. R., Ch. App. 283, overruling *Renshaw v. Bean*, 18 Q. B. 112; *Wilson v. Townend*, 1 Drew. & Sm. 324; *Davies v. Marshall*, 1 Drew. & Sm. 557; *Weatherley v. Ross*, 1 H. & M. 349; *Hutchinson v. Copestake*, 8 C. B., N. S. 863; *Cooper v. Hubbuck*, 30 Beav. 160.

The right to the easement of light continues uninterruptedly until

some unequivocal act of intentional abandonment has been done by the person who acquired it, which would remit the adjoining owner to the unrestricted use of his own premises. It would be a question in each case whether the circumstances established an intention to abandon altogether the future enjoyment and exercise of the right. If such an intention were clearly manifested, the adjoining owner might build as he pleased upon his own land; and should the owner of the previously-existing window restore the former state of things, he could not compel the removal of any building which had been placed upon the ground during the interval. For a right once abandoned, is abandoned for ever. *Tapling v. Jones*, 11 H. L. 319.

A different question arises, where a house enjoying ancient lights has been pulled down and rebuilt,—whether the right to the lights remains, or whether it will be lost.

In a recent case it seems to have been the opinion of Sir G. Jessel, M. R., that although when a party rebuilds a house and puts the windows in the same positions, it would for this purpose be the same house, and the windows would be protected absolutely; nevertheless, that where the new house is built in a different position, at a considerable distance from the old house, and new windows are put into it, the mere fact that those windows are in a parallel plane at a greater distance, or in diagonal planes at a similar distance, will not make them the same windows within the act. *Secus* if the difference in the posi-

tion of the windows had been a few inches or a few minutes of a degree, or perhaps a degree, as the old maxim, *De minimis non curat lex*, would apply to such a case as to all others. In the same case, however, Fry, J., seems to have thought that a change in the plane of the windows would not put an end to the right under the act, and that the right remained where any portion of the light which would have passed over the servient tenement through the old windows passes also through the new windows. See *National and Provincial Plate Glass Insurance Company v. Prudential Assurance Company*, 6 Ch. D. 758, 759, in which case, however, the only point ultimately decided by Fry, J. (before whom it came on for trial), was that where a building containing ancient lights was pulled down and replaced by another, in which the front was set back, and a former window converted into a skylight, that the right to access of light was not lost.

Where a person is entitled to the lateral support of his neighbour's soil for a building of a certain weight, if he makes a material addition to the weight of the building, he will destroy the right which he otherwise would have had (*Murchie v. Black*, 19 C. B., N. S. 190, 206; *sed vide Brawn v. Robins*, 4 H. & N. 186; *Strayan v. Knowles*, 6 H. & N. 454; *Hunt v. Peake*, 1 Johns. 705). So an easement of lateral support may be lost by taking down an old house and substituting a building of an entirely different construction as regards the wall or foundation on which it rested. Per Cockburn,

L. J., in *Angus v. Dalton*, 3 Q. B. D. 102.

Where an alteration in the dominant tenement does not impose any additional burden or restriction on the servient tenement, the easements will remain. Thus a person will not lose the easement of water, by converting a fulling-mill into a mill to grind corn (*Luttrell's Case*, 4 Rep. 87), nor by altering the dimensions of the mill wheel (*Saunders v. Newman*, 1 B. & Ald. 258), nor by making straight a watercourse which flowed in a crooked way along a road (*Hall v. Swift*, 6 Scott, 167), nor will he lose the easement of eaves-dropping by slightly raising the eaves of a building projecting over adjoining land (*Harvey v. Walters*, 8 L. R., C. P. 162); nor will a person who has gained a prescriptive right to pollute water by using certain materials in manufacturing a certain article, lose his right by using other materials for the same purpose, provided he does not increase the pollution. See *Baxendale v. M'Murray*, 2 L. R., Ch. App. 790.

6. *Extinguishment of Easement by the Extinction of the Dominant Tenement.*

If an easement for a particular purpose is granted, when that purpose no longer exists, or when, in other words, the dominant tenement ceases to exist, there is necessarily an end of the easement. See *National Guaranteed Manure Company v. Donald*, 4 H. & N. 8; there, by 59 Geo. 3, c. 13, a company was incorporated for the purpose of making a canal, and em-

powered to supply the canal with water from certain rivers. In 1824, the canal company made a cut, and erected on it a water-wheel for pumping water into the canal. The canal company occasionally used the water-wheel to drive a bone crushing mill. In 1853, the 16 & 17 Vict. c. 119, for converting the canal into a railway, after repealing the 59 Geo. 3, c. 22, re-incorporated the company for the purpose (*inter alia*) of making a railway. By section 10 it was enacted, that easements vested in the canal company should, after the passing of the act, be vested in the company thereby incorporated for their absolute benefit; and by section 11, that "all titles by possession" acquired by the canal company should be good in favour of the company thereby incorporated as the same were good immediately before the passing of that act in favour of the canal com-

pany. The 83rd section provided, that in case any of the works used for the purposes of the canal should, in consequence of the stopping up of the canal, be no longer required for the purposes of the act, the works which should be no longer required might be sold by the company in the manner provided by the Lands Clauses Consolidation Act, 1845, with respect to the sale of superfluous lands. The canal having been stopped up and converted into a railway, it was held by the Court of Exchequer, that on the conversion of the canal into a railway, the right of the company to the flow of water in the cut for driving the wheel ceased, and that the railway company could not convey to a purchaser any right to such flow. "This easement," said Pollock, C. B., "was incident to the canal, and when the canal ceased to exist, the easement altogether ceased."

FOX *v.* THE BISHOP OF CHESTER (*a*).

In the House of Lords, June 3rd (in Error).

[REPORTED 6 BING. 1.]

ADVOWSON—NEXT PRESENTATION—SIMONY.]—*The sale of a next presentation, the incumbent being in extremis, within the knowledge of both contracting parties, but without the privity or with a view to the nomination of the particular clerk, is not void on the ground of simony.*

THIS was a writ of error, brought by the plaintiff below, from a judgment of the Court of King's Bench at Westminster, affirming a judgment of the Court of Great Sessions at Chester, on a special verdict in a quare impedit commenced in the latter Court.

The first count of the declaration stated that the advowson of the rectory of the church of Wilmslow was appurtenant to the manor of Bollyn; and set out the title of Thomas J. Trafford for life thereto; that T. J. Trafford, by Indenture, dated 12th November, 1819, granted unto the plaintiff, his executors, &c., the advowson of the rectory and parish church of Wilmslow, for ninety-nine years, if the grantor should so long live. Averment, that grantor was still living, and that the church became vacant by the death of the last incumbent, whereby it belonged to the plaintiff to present, but the defendant hindered him from so doing.

There was a second count, setting out a title to the advowson in gróss, and omitting all mention of the manor; in all other respects it was similar to the first.

The defendant cravedoyer of the Indenture made between the plaintiff and Trafford, whereby it was witnessed that in consideration

(*a*) *S. C.* 1 Dow & C. 416; 3 Bligh, N. S. 123, overruling 2 Barn. & Cress. 635.

of 6000*l.* paid to Trafford by the plaintiff, the former had granted, bargained, sold and demised, and by the said Indenture did grant, &c., all that the advowson, donation, right of patronage, presentation and free disposition of, in and to the rectory and parish church of Wilmslow, with the rights, members and appurtenances thereunto belonging; habendum, for ninety-nine years, if Trafford should so long live, with a proviso that when and so soon as he the said Edward Vigor Fox, his executors, &c., should have presented to the said rectory or church of Wilmslow, by reason of the same having become vacant or void by the death, resignation, deprivation, eviction, promotion or cession of J. Bradshaw, the incumbent, or otherwise, or through the wilful neglect or default of him the said Edward Vigor Fox, his executors, &c., the said rectory or church should have been suffered, as to the presentation or right of presentation thereto, to lapse, he the said Edward Vigor Fox, his executors, &c., should and would at any time or times thereafter, at the request and proper costs and charges of the said Thomas Joseph Trafford, or such person as he should appoint, re-assign the said advowson to him the said Thomas Joseph Trafford, or such person as aforesaid, for all the residue which should be then unexpired of the said term of ninety-nine years, free from all incumbrances by the said Edward Vigor Fox, his executors, &c. He then craved oyer of the Indenture in the second count mentioned, which was declared to be in the same words as the Indenture in the first count, and therefore not set out on the record.

He then pleaded fifteen pleas, among which the fourth—the plea chiefly relied on—averred that the said church of Wilmslow is within the diocese of Chester, and a benefice with cure of souls; and that whilst the said Thomas Joseph Trafford was so seised of the said manor and of the said advowson, and before the making of the corrupt, simoniacal and unlawful agreement, in this plea after mentioned, to wit, on the 11th day of November, in the year of our Lord 1819, the said J. Bradshaw, then being incumbent of and filling the said church, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then despaired of, whereof, as well the said Edward Vigor Fox and Thomas Joseph Trafford, as one George Uppleby, clerk, in that plea after mentioned, to wit, on, &c.; and also at the time of making the corrupt, simoniacal and unlawful agreement in that plea after mentioned, there

had notice; that whilst the said Thomas Joseph Trafford was so seised of the said manor to which, &c., with the appurtenances, &c., and of the said advowson as aforesaid, was so afflicted, and in such danger, state and condition as aforesaid, to wit, on, &c., they the said Thomas Joseph Trafford, Edward Vigor Fox and George Uppleby, and each of them, then and there, well knowing the premises, and believing and expecting that the death of the said J. Bradshaw, of the mortal disease aforesaid, was then and there fast approaching, and that by means of the death of the said J. Bradshaw, the said church would forthwith become vacant, it was in such belief and expectation corruptly, simoniacally and unlawfully, and against the form of the statute in such case made and provided, agreed by and between the said Thomas Joseph Trafford and the said Edward Vigor Fox, with the knowledge of the said George Uppleby, that the said Edward Vigor Fox should pay to the said Thomas Joseph Trafford a sum of money, to wit, the sum of 6000*l.*, and that the said Thomas Joseph Trafford, in consideration thereof, should grant, bargain and sell to the said Edward Vigor Fox, the next presentation to the said church; *and that, in order to make such grant, bargain and sale, and as a means of making such grant, bargain and sale to the said Edward Vigor Fox of the next presentation to the said church, and as a shift, contrivance and device to evade and elude the making such grant, bargain and sale, as a mere grant, bargain and sale to the said Edward Vigor Fox, of the next presentation to the said church in express terms, the said Indenture in the said declaration mentioned to have been made between the said Thomas Joseph Trafford and the said Edward Vigor Fox should be made, and that the said Thomas Joseph Trafford should seal, and as his act and deed deliver the said Indenture: that afterwards, and whilst the said J. Bradshaw, so being the incumbent of and filling the said church as aforesaid, was so afflicted, and in such danger, state and condition as aforesaid, to wit, on the 12th day of November, in the year of our Lord 1819, to wit, at, &c., in pursuance, furtherance and performance of the said corrupt, simoniacal and unlawful agreement; and in order to make such grant, bargain and sale of the next presentation to the said church, and as a means of making such grant, bargain and sale by the said Thomas Joseph Trafford to the said Edward Vigor Fox of the next presentation to the said*

church, and as a shift, contrivance and device to evade and elude the making such grant, bargain and sale, as a mere grant, bargain and sale to the said E. V. Fox, of the next presentation to the said church in express terms, the said Indenture, in the said declaration mentioned to have been made between the said T. J. Trafford and the said E. V. Fox, was made, and the said T. J. Trafford did then and there seal, and as his act and deed deliver, the said Indenture: and that the said J. Bradshaw, so being the incumbent of and filling the said church as aforesaid, remained and continued so afflicted as aforesaid, and in such danger, state and condition as aforesaid, from time to time in that respect in this plea above mentioned, until the time of his death, and that afterwards, to wit, on the 12th day of November, 1819, Bradshaw, so being the incumbent of and filling the said church as aforesaid, of the disease aforesaid died, to wit, at, &c.; and by means thereof the said church then and there became and was vacant: that, by reason of the premises, and by force of the statute in such case made and provided, the said last-mentioned Indenture became, and was, and is utterly void, frustrate, and of no effect in law, and wholly inoperative to grant, pass or convey any estate, right, title or interest in the said advowson, or any presentation, or any right of presentation to the said church to the said E. V. Fox; that afterwards, to wit, on the 30th day of December, 1819, at, &c., the said E. V. Fox, under colour, and by pretence and means of the said last-mentioned Indenture so made as aforesaid, in pursuance of the said corrupt, simoniacal and unlawful agreement, did corruptly, simoniacally and unlawfully, and against the form of the statute in such case made and provided, present the said George Uppleby, clerk, to the said bishop to be admitted, instituted and inducted into the said church of Wilmslow, to wit, at, &c.; that by reason of the premises, and by force of the statute in such case made and provided, the said presentation of the said George Uppleby by the said E. V. Fox, so made as aforesaid, became and was, and is utterly void, frustrate, and of no effect in law.

The fifth plea was like the fourth, omitting the parts in *Italics*; and

The sixth plea varied from the fourth only by omitting to state the privity of Uppleby.

The replication to the fourth plea took issue that it was not corruptly, &c., agreed by and between the plaintiff and Trafford, with

the knowledge of Uppleby, as in that plea alleged. By a similar replication to the fifth plea, and to each of the other pleas, it was denied that it was corruptly, &c., agreed, as in those pleas alleged.

The jury found by special verdict that before and on the 12th day of November, in the year of our Lord 1819, the said Thomas Joseph Trafford was seised of the manor and advowson within mentioned, and that before and on the said 12th day of November, in the said year of our Lord 1819, the within-named Joseph Bradshaw was the incumbent of the within-named church, in the pleadings within mentioned, and that the said church was then full of the said Joseph Bradshaw; that the said J. Bradshaw, so then being incumbent of and filling the said church as aforesaid, was, before and upon the said 12th day of November, in the said year of our Lord 1819, afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then greatly despaired of; and that he was and continued so afflicted with such mortal disease and in extreme danger of his life, and his life was and continued to be greatly despaired of until the time of his death; and that the said Joseph Bradshaw, so being such incumbent as aforesaid, died of the said mortal disease on the said 12th day of November, in the said year of our Lord 1819, at half-past eleven o'clock at night of the same 12th day of November; that on the said 12th day of November, in the said year of our Lord 1819, at ten minutes before three o'clock in the afternoon of the same day, and whilst the said Joseph Bradshaw was such incumbent as aforesaid, an agreement was made and concluded between the said Thomas Joseph Trafford, so being seised of the said manor and advowson as aforesaid, and the said Edward Vigor Fox, for the sale by the said Thomas Joseph Trafford to the said Edward Vigor Fox of the next turn or presentation of the said church, for and in consideration of 6,000*l.* of lawful money of Great Britain; that on the said 12th day of November, in the said year of our Lord 1819, and immediately after the making of such agreement, they the said Thomas Joseph Trafford and Edward Vigor Fox, in pursuance of such agreement and in order to carry the same into effect, and as an expedient to convey the next presentation alone, sealed and delivered the within-mentioned Indenture, bearing date the 12th day of November, in the said year of our Lord 1819; and that the said agreement was made and the said Indenture was sealed

and delivered in the lifetime of the said Joseph Bradshaw ; that the said Joseph Bradshaw, at the time of making the said agreement and also at the time of sealing and delivering the said Indenture, was afflicted with the said mortal disease, and in extreme danger of his life, and that his life was thereby then greatly despaired of : that the said Thomas Joseph Trafford and the said Edward Vigor Fox, at the time of making the said agreement, and also at the time of sealing and delivering the said Indenture, well knew and believed that the said Joseph Bradshaw was afflicted with the said mortal disease, and was in extreme danger of his life, and that his life was thereby then greatly despaired of ; that the said agreement was made and concluded, and the said Indenture was sealed and delivered, without any knowledge or privity whatsoever of the said George Uppleby, and without any intention to present the said George Uppleby to the said church when it should become vacant.

Upon the argument on this special verdict, which took place in June, 1822, the Court of Great Sessions at Chester were divided in opinion ; but, in order to carry the cause up to a higher tribunal, the judgment was entered for the defendant by consent.

On a writ of error to the Court of King's Bench, the judgment of the Court below was affirmed in Hilary Term, 1824 ; and the present writ of error was brought to reverse both judgments.

The question raised by this special verdict was, whether the sale of a next presentation, the incumbent being *in extremis*, within the knowledge of both contracting parties, but without the privity of, or a view to the nomination of the particular clerk, be alone, without other circumstances, void on the ground of simony.

The statute of 31 Eliz. c. 6, ss. 4 & 5, enacts, "And for the avoiding of *simony and corruption in presentations*, collations and donations of and to benefices, dignities, prebends and other livings and promotions ecclesiastical, and in admissions, institutions and inductions to the same, be it farther enacted by the authority aforesaid, that if any person or persons, bodies politic and corporate, shall or do at any time after the end of forty days next after the end of this session of Parliament, for any sum of money, reward, gift, profit or benefit, *directly or indirectly*, or for or by reason of any promise, agreement, grant, bond, covenant or other assurances, of or for any sum of money, reward, gift, profit or benefit whatsoever, *directly or*

indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration, that then every such presentation, collation, gift and bestowing, and every admission, institution, investiture and induction thereupon, shall be utterly void, frustrate, and of none effect in law; and that it shall and may be lawful to and for the Queen's Majesty, her heirs and successors, to present, collate unto, or give or bestow every such benefice, dignity, prebend and living ecclesiastical, for that one time or turn only; and that all and every person or persons, bodies politic and corporate, that from thenceforth shall give or take any such sum of money, reward, gift or benefit, directly or indirectly, or that shall take or make any such promise, grant, bond, covenant or other assurance, shall forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend and living ecclesiastical; and the person so corruptly taking, procuring, seeking or accepting any such benefice, dignity, prebend or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice, dignity, prebend or living ecclesiastical."

The case was argued by Cross, Serjt., for the plaintiff in error, and by the Solicitor-General for the defendant in error. The reasons adduced on the part of the plaintiff in error, for reversing the judgment of the Court below, were as follow:—

That, by the law of England, the patronage or the right of presenting to a benefice is a property or estate, capable of being conveyed in fee, for life, for years, for any number of turns, or for the next turn only, whilst the church is full; when it is empty, incapable of being conveyed, *Baker v. Rogers* (b), *Stephens v. Wall* (c), *Brookesby v. Wickham* (d); because it is like the rent of an estate become in arrear, which is a chose in action, and cannot be assigned. But the church is full as long as the incumbent is alive, and is equally so whilst he is in his last sickness as in full health.

The patron, therefore, of a living may be changed at any time till the last moment of the existence of an incumbent, and a new patron substituted; and neither the common nor statute law imposes any restriction in this respect on lay patrons (e).

(b) Cro. Eliz. 789.

(c) Dyer, 282.

(d) 1 Leon. 167.

(e) 12 Annæ, st. 2, c. 12, applies to clerks only.

It is the exercise only of the right of presenting by the patron for the time being which is a public trust, and as such controlled by law, which sufficiently guards the interest of the church, by providing that the existing patron shall not nominate from corrupt motives, or by reason or in consequence of a corrupt contract.

This restriction arises from the statute of 31 Eliz. c. 6, and from this statute only ; and the question turns entirely upon the construction to be put upon its provisions. It is a penal statute, and it creates forfeitures ; and, therefore, according to the acknowledged principle of law, must be construed strictly, and not extended by a supposed equity.

The statute avoids the presentation which the patron for the time being makes for any money, reward, gift, profit or benefit, arising directly or indirectly ; or for any promise of such reward, directly or indirectly. It is direct or indirect reward, not direct or indirect presentation, which it prohibits in express terms.

In the present case, Mr. Fox, the plaintiff in error, was the patron at the time of the actual vacancy, and he selected the clerk, without any communication with Mr. Trafford ; and his selection was not influenced or produced by money or reward, directly or indirectly. The presentation by the actual patron is not tainted with the least suspicion of simony.

To bring the case within the provisions of the act it must be contended, as it was in the Courts below, that Mr. Trafford was to be considered as the patron presenting the clerk, and receiving the reward for that purpose, and the plaintiff in error as the mere instrument to carry such presentation into effect. But there is nothing in the finding of the jury to warrant such a conclusion.

It is admitted that the grant of a next presentation during the life of an incumbent may be void on the ground of simony ; but that is where the contract is really simoniacal—a contract for the presentation by the patron of a *particular clerk* for money, and the conveyance of the next presentation is a contrivance or instrument to carry it into effect. This will be illustrated by the case of *Winchcombe v. Pullleston* (*f*), the leading case on the subject : the pleadings in *Winch's* Entries, 887, fully explain the nature of the transaction. The contract was made between the clerk to be presented and the patron, the

(*f*) Noy, 25 ; Hob. 165 ; 1 Brownl. & Golds. 164.

incumbent being then sick of a grievous disease, and expected every day to die, that in consideration of 90*l.* to be paid by the clerk to the patron, he should procure him to be presented to the church when vacant; and to assure such presentation he should grant the next avoidance to a person, a familiar friend of the clerk, specially nominated and appointed by him in confidence to make the presentation, with the intent that the clerk should be presented; and it is averred, that in performance of this contract the grant was made, and the contract was so found by the jury. Here was a clear simoniacal contract, and the substituted patron was the mere instrument to carry the contract into effect, and to appoint the particular clerk. The case of *Closse v. Pomcoyes* (*g*) is nearly to the same effect, and is another instance of a contrivance to carry into effect a simoniacal contract.

If the presentation do not appear upon the face of the pleadings to be clearly simoniacal, that is, a presentation by the existing patron of the clerk for reward, it is a question for the jury whether each transaction be or be not a shift or contrivance to carry a simoniacal contract into effect; as, under the statutes against usury (*h*), if there appear on the face of an instrument a loan, and a reservation of illegal interest, the Court can give judgment against its validity; but if the transaction does not appear on the face of it (*Yeoman v. Barstow* (*i*), *Kitchin v. Calvert* (*k*)) necessarily to be usurious, it is a question of fact for the jury, and whether it be a shift or contrivance or not. In both cases, the really simoniacal or usurious contract ought to be shown by a special plea when a special plea is required, and in all cases found by the jury.

The defendant has not pleaded in this case, and the jury have not found, that there was any corrupt or simoniacal contract that Trafford should present the clerk, and that the grant of the next presentation was a mere contrivance to carry it into effect.

In the absence of such a finding the Court cannot make any presumption against the validity of the grant. Simony as well as fraud is not to be presumed, but found.

But if it were competent for the Court to make any presumption, the facts pleaded and found do not warrant any such presumption in this case.

(*g*) Cited Lane, 73.

(*h*) Since abolished.

(*i*) Lutw. 273.

(*k*) Lane, 100.

If it had been found that money was to have been given to Trafford if Uppleby should be presented, or that it was the purpose or even intent of the plaintiff to have presented Uppleby, it might have been argued that the grant was made for that purpose, and if so, the grant may possibly be said to be an instrument to carry into effect the particular appointment; and the clerk may possibly be said to have been presented by the former patron. In such a case the substituted patron has no power of selection, but is a mere instrument; and this appointment, made virtually by the old patron, is an appointment made for reward. But if there is no intention or purpose to present any particular clerk, the new patron is a free agent, may select whom he pleases, and if he select any clerk without reward, he is not within either the letter or the spirit of the act. The selection of the clerk, the object aimed at by the statute, is free from all taint. The old patron parts with, and the new patron purchases, the right of selection, by means of the grant, and that right is fairly and properly exercised.

The judgment of the Court of King's Bench (l) proceeds in a great degree upon the ground that Courts have a right to consider what is an evasion of a statute, a power which, it is humbly conceived, does not apply, at least to the case of a penal statute creating forfeitures, and if allowed to be exercised would lead to great doubt and uncertainty in the law.

Upon referring to decided cases, there is none in which it has been held that the grant of a next presentation, the incumbent being *in extremis*, is void, a short note in Winch, 63 (m), excepted, in which mention is made of its having been so adjudged in Chancery, but under what circumstances does not appear; it may have been so adjudged on the special facts.

On the other hand, there is a solemn decision of the Court, *Barret v. Glubb* (n), that by the grant of an advowson, when the incumbent was on his deathbed, and it was uncertain whether he would live over the night, with full knowledge in the contracting parties, the next presentation did pass, and was not avoided by simony, which is a direct authority for the plaintiff in error. If the grant of next presentation, when united with all other future presentations, was not

(l) 2 Barn. & Cress. 653.
(m) *Sheldon v. Bret.*

(n) 2 Black. 1052.

void, the grant of the next presentation alone could not be so. This decision has never yet been questioned until the present case.

The argument for the defendant in error was in substance as follows:—

1st. Simony was an offence by the common law of the land antecedently to the statute of 31 Eliz. c. 6, and the transaction, as stated upon the record, was a corrupt and simoniacal contract for the sale of the next living or presentation, under the special circumstances of the case, 1 Inst. 17 B; 3 Inst. 156; *Mackaller v. Todderick* (o); *Winchcombe v. Pulleston* (p); *Bartlett v. Vinor* (q).

2ndly. The presentation in the present case was substantially a presentation by Mr. Trafford, the seller, and was by him a presentation for money.

3rdly. The transaction in question was a shift and contrivance to evade the provisions of the statute of 31 Eliz. c. 6.

4thly. It was a presentation by Mr. Trafford, for money, of such clerk as Mr. Fox might nominate; and a contract to such effect is simoniacal, though it may have passed without the privity of the clerk who may afterwards happen to be presented. The privity of a clerk is not a necessary ingredient in a corrupt or simoniacal contract, as has been established by several authorities, and particularly in *Doctor Hutchinson's Case* (r), and in the case of *Baker v. Rogers* (s).

5thly. By law, no grant can be made of the next presentation when the church is empty, *Brookesbie's Case* (t); of which rule, though it has been sometimes said that the reason is that the presentation is then a fruit fallen, or that it is a mere personal privilege, or that it is severed from the advowson, and would pass to the executor, the true and substantial reason is public utility, and the better to guard against the mischiefs of simony, as was expressly laid down by Lord Mansfield, C. J., and Wilmot, J., in *The Bishop of London v. Wulforstan* (u). And the contract in the present instance was made upon the footing and understanding of the church being full in name and form only, but vacant in substance and reality.

6thly. The law, of which the object and policy is the presenting to benefices, with cure of souls, of men of learning and piety, and the

(o) Cro. Car. 361.

(p) Hob. 167.

(q) Carth. 252.

(r) 12 Rep. 101.

(s) Cro. Eliz. 788.

(t) Cro. Eliz. 174; S. C. 1 Leon. 156;
3 Leon. 256; Dyer, 282.

(u) 3 Burr. 1504.

preventing of scandal to religion and prejudice to the Church, by preferments either of improper persons or from corrupt motives, will not endure the danger which would arise from the sale of the right of presentation when the incumbent is at the point of death, where the contracting parties knew that fact, and where the contract is made with a view to, and upon the terms of, an immediate presentation.

7thly. There is no mischief intended to be guarded against by the rule of law prohibiting the sale of the next presentation, when the church is empty, which might not be equally incurred if such presentation could be sold when the incumbent is on his deathbed, and known to be so both to the buyer and to the seller.

8thly. The statute 31 Eliz. c. 6, ought to receive a liberal construction in order to reach the evil for the remedy of which it was passed, and because the deed set forth in the record was only a contrivance to pass an immediate presentation for money, in violation of the policy, and evasion of the provision of the statute.

Lastly, in *Sheldon v. Bret*, it was expressly decided, that a grant of the next turn for money was simoniacal, when the parson was sick in his bed and ready to die.

On this day the opinion of the Judges of the Courts of Common Pleas and Exchequer was delivered as follows by—

Best, C. J. (v):—My Lords, the question which your Lordships have been pleased to put to the Judges in this case is, whether, upon the whole of the matters stated or referred to in the special verdict, the right to present to the rectory or parish church of Wilmslow, upon the death of the Rev. Joseph Bradshaw, was by law vested in Edward Vigor Fox, the plaintiff in error. The Judges who heard the argument at your Lordships' bar are unanimously of opinion, that, upon the whole matters stated or referred to in the special verdict, the right to present to the rectory or parish church of Wilmslow, upon the death of the Rev. Joseph Bradshaw, was by law vested in Edward Vigor Fox, the plaintiff in error.

The patronage of churches was at first yielded by the bishops to the lords of manors who founded or endowed them, and annexed them to the manors in which the churches were situate. By the grant of a manor, the *advowson appendant* to it passes to the grantee.

(v) Afterwards Lord Wynford.

Many of these advowsons have since been severed from the manors to which they were appendant.

Although advowsons, when in *gross*, as these which are separated from the manors to which they belonged are called, are a species of spiritual trusts, yet they have been said by Lord Kenyon and other Judges to be trusts connected with interests; and they certainly do not lose the temporal character which originally belonged to them, but may be sold either in perpetuity, or for the next or any number of avoidances.

If the perpetual advowson be sold when the church is void, the next presentation will not pass; and if the next avoidance only be sold after the death of the incumbent, the sale is altogether void. It may be wise to carry the restraint on the sale of this species of property still further, and to say the next avoidance shall in no case be sold.

Undoubtedly, much simony is indirectly committed by the sale of next presentations. If it be proper to prevent the giving of money for a presentation, it seems equally proper to prevent the sale of that which gives the immediate right to present. But the Courts of Law have never thought that they were authorized to go this length; and, even in cases where the purchase of the next presentation seemed to bring a party nearer to simony than in any other, it was found necessary to have the aid of the legislature to prevent such purchases. A clergyman might buy a next presentation and present himself, before the passing of the statute of the 12 Anne, c. 12. The preamble to the second section of that statute states that "some of the clergy have procured preferments for themselves by buying ecclesiastical livings," and then the section provides, that if any one shall, either directly or indirectly, take or procure the next avoidance for money, reward, gift, profit or benefit, or shall be presented or collated (which words limit the operation of the act to clergymen), that it shall be deemed simoniacal.

It seems to me that, if the terms of the statute of Elizabeth could be extended by equity, the case of a clergyman buying a presentation with the intention of presenting himself might have been reached without any other act of parliament. If such a case as that were not within the statute of Elizabeth, the case on which your Lordships have desired our opinion cannot be affected by that statute. The

church, in the present case, was full ; no clergyman was privy to the agreement ; and the living was not intended by the plaintiff in error, at the time he bought the presentation, for the clerk that he afterwards presented. But I would observe, that persons have recovered who appeared to be dying. The special verdict only states, that the incumbent, at the time of the sale, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby greatly despaired of ; and that he was so afflicted with such mortal disease, and in extreme danger of his life, and his life was and continued to be greatly despaired of until his death, which happened at half-past eleven at night of the day on which the sale was completed. Many who are afflicted with mortal diseases, and are from such diseases thought to be in imminent danger of dying, live for a considerable time, and the effects of the diseases are sometimes so far suspended, that the persons so afflicted become again capable of performing the duties belonging to their stations in life.

If this conveyance was void, it must have been void at the time it was executed, and would remain void into whatever hands and under whatever circumstances the right of presentation might have passed. Now if this incumbent had been restored to apparent health, and the vendee had sold the presentation to another person ignorant of the circumstances under which the first sale was made, it would be most unjust to hold that the second sale was void ; and yet this would be the necessary consequence of a decision that the sale was simoniacal. Whilst the law permits the next presentations of livings to be sold during the lives of the incumbents, as long as the incumbent is alive the sale is good. Every one who purchases a next presentation contemplates the death of the incumbent. If this contemplation made the sale void, no sale of a next avoidance could be good. If the death of the incumbent, and the prospect of using the presentation, may be contemplated, the time when the death is to happen cannot be material.

This case has been compared by the counsel for the defendant in error to those of contemplation of bankruptcy. But a party is not permitted to do an act in contemplation of bankruptcy which is injurious to creditors. A transfer of goods or payment of money in contemplation of bankruptcy, was, before the 6 Geo. 4, void. By that act, such a transfer or payment is an act of bankruptcy, because

such transactions are direct frauds on the creditors of the bankrupt. But the death of an incumbent may be contemplated, and the purchasing of the next avoidance, in consequence of such contemplation, is no fraud upon any one. The cases, therefore, have no resemblance to each other. The making the legality of the transaction to depend on the state of the incumbent's health would give occasion to much expensive litigation, and, probably, to much false swearing, and would keep churches for a long time void.

The affairs of men are best regulated by broad rules, such as exclude all subtle disputes, all doubtful, unsatisfactory inquiries. It would be difficult to establish a rule that should settle what degree of probability of the approaching death of an incumbent should prevent the sale of the avoidance of a benefice, and more difficult to ascertain by evidence when an incumbent was within that degree. I submit to your Lordships that the most convenient rule is that which I conceive the law has already established, namely, *that the right to sell the presentation continues as long as the incumbent is in existence.*

The judgment of the Court below is, according to the words of the Chief Justice, "founded on the language of the 31 Eliz. c. 6, and the well-known principle of law, that the provisions of an act of parliament shall not be evaded by shift or contrivance." The words of the fifth section of the act are, "If any person shall, for any sum of money, reward, gift, profit or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant or other assurance of or for any sum of money, reward, gift, profit or benefit whatsoever, directly or indirectly, present or collate any person to any benefice, or give or bestow *the same* for or in respect of any such corrupt cause or consideration." This clause applies only to the person presenting to the living. If he has received no reward or promise of reward, the presentation is not affected by the terms of the act. The plaintiff in error, who made the presentation, received no reward, nor had any expectation of reward, for making this presentation. I agree, that if some other person had received a reward for the plaintiff in error, and was to account to him for it,—if the plaintiff in error was not the real purchaser of the avoidance, but the person presented, or some one in his behalf, these and many other things might be considered as frauds on the act, and have avoided the contract. But such things should have been shown by the

pleadings, and found by the jury. All that appears on this record is, that the plaintiff in error bought the next avoidance of a living that was full; and that, without any corrupt consideration, he used the right of presentation which he had purchased. All this he had a right to do. There is no circumstance found that shows this is a fraud on the act, unless it be a fraud on the act to buy the presentation to a living which the seller and buyer expect will soon become vacant. Presentations are bought and sold every day with this expectation.

There is no legal authority to support the judgment of the Court, except a short and loose note in Winch's Reports of Hutton (*a*), saying what used to be done in Chancery. On the other hand, the case of *Barret v. Glubb* (*b*) is directly opposed to the judgment of the Court of King's Bench. It was thought that case had not the weight of a judicial decision, because it was not acted upon. But it was acted upon. Lord Bathurst decreed the conveyance of the advowson which included the next presentation, and gave the purchaser and his clerk their costs. The seller must have acquiesced in this decision, or he would have prosecuted his *quare impedit*; and if the Common Pleas had retained the opinion that they had certified to the Chancellor, he might have carried it, by bill of exceptions, to the King's Bench. When the Chancellor decreed a conveyance, without doubt it was such a conveyance as gave the purchaser a legal title from a time before the death of the incumbent, by making the assignment take effect from the date of the contract to assign; there was, therefore, no occasion for any injunction, as was supposed by the King's Bench. The question, by the conveyance decreed, was fairly raised for another Court of Law, if the party had not completely acquiesced in the judgment of the Common Pleas, confirmed by that of the Chancellor. There are no other cases in the books which bear much on the question proposed to us by your Lordships. For the reasons given in support of the Judge's answer to that question, I only am responsible.

Earl of Eldon.—My Lords, I will trouble your Lordships with a very few words on this case, which involves questions certainly of very considerable importance. A case upon the same subject was decided by the Court of Common Pleas many years ago: and the

(*a*) *Sheldon v. Bret.*

(*b*) 2 Black. 1052.

manner in which that case was decided in the Court of Common Pleas was of very great importance: first, because it was a case in which a Court of Equity sent the case for the opinion of that Court, in order to enable that Court of Equity to decide what it should do in equity. The case was this: there had been the purchase of an advowson, the incumbent being at the time in such a state that he died within two days afterwards. I believe, indeed, the period was very nearly the same, if not exactly the same, as in the present case. Your Lordships will recollect it was one circumstance in that case, that the intended purchaser of the estate stated that there must be no delay, but that the contract should be immediately completed. The Court at that time was filled by Lord Chief Justice De Grey (a very eminent Judge), Mr. Justice Blackstone, and by two other Judges. The case was sent by Lord Bathurst for the opinion of the Court of Common Pleas, for the purpose of enabling the Lord Chancellor to determine whether the mere contract should be carried into execution by an actual conveyance. Now that being the nature of the case, and that being a case in equity, makes it a much stronger case than if the Court of Equity had not taken that course; because your Lordships will recollect, that with respect to many cases of contracts which come before Courts of Equity, the parties resort to a Court of Equity because it is conceived there are grounds upon which a Court of Equity will grant its interposition to carry into effect that contract. In that case the controversy was, whether supposing that contract to be good in law, the party ought to be left to his remedy at law instead of coming into equity for a specific performance of the contract; however, the Chancellor of that day thought fit to take the opinion of the Court of Common Pleas upon the question, whether the advowson being sold at such a period, nearly approaching the death of the clergyman, the presentation as well as the advowson being included in the conveyance, carried with it the assignment of the presentation; and, my Lords, the Court of Common Pleas were of opinion that it did, and so they certified to the Court of Chancery. I observe in the proceedings in this case in the Court below, the Court seems not to have been fully informed by the counsel at the bar; and I may take the liberty of saying so, because I see two Judges of that Court who now concur in the opinion that this was a good conveyance, and who then thought it was not a good one. The

Court, my Lords, seem to me to have been not specifically informed as to what was the fact. We have heard it stated at the bar, that an injunction had been granted by the Lord Chancellor against the proceedings in the *quare impedit*; and that, after that opinion of the Court of Common Pleas was communicated to his Lordship, he did not continue the injunction. Now, my Lords, that circumstance is really of no weight. It was quite unnecessary to continue the injunction, because the moment it was intimated that in the opinion of the Court of Common Law the contract was a good contract to be carried into execution, it was not necessary to take the trouble of asking for the injunction being continued, for the conveyance was immediately executed which carried the contract into execution; and that conveyance having been executed, it would be a good conveyance of the presentation as well as of the advowson. The conveyance being a good conveyance of the presentation, being declared by the Court of Chancery to be a good equitable conveyance of the presentation, and the Lord Chancellor proceeding on the opinion of the Court of Common Pleas, there was an end of all question. Now, my Lords, regarding the effect of this decision on human transactions, seeing that in all probability many transactions have taken place upon the footing of it, it does appear to me, I confess, very undesirable that the decision should be shaken by the Courts of Law. I confess I had much rather see an act of parliament than see a further extension of that doctrine of which we have heard in the argument at the bar; and I am very happy to take the opportunity of stating to your Lordships that I most fully concur in the opinion which has been expressed by the learned Judges.

The LORD CHANCELLOR (Lord Lyndhurst).—Is it your Lordships' pleasure this judgment be reversed?

Judgment reversed.

Fox v. The Bishop of Chester is a leading case upon the law relating to advowsons, an important class of incorporeal hereditaments, and the opinion of the Judges of the Courts of Common Pleas and Exchequer, as delivered by Best, C. J., contains

a very lucid exposition both of their origin, and of the mode in which, whether considered as a trust, or the subject of property, they may be dealt with.

In examining the law respecting advowsons, it is proposed to con-

sider—I. Their origin, and how many kinds there are; II. Appropriations; III. Unions; IV. Presentations to advowsons; V. On the examination of persons presented; VI. Admission, institution, induction and necessary acts of the presentee; VII. On lapse; VIII. Alienation, descent and incidents of advowsons; IX. Presentations to and purchase of advowsons and next presentations when legal, when void as simoniacal; X. Bonds of resignation; XI. On the several remedies relating to advowsons; XII. Limitations in suits as to advowsons.

It is not, however, proposed to notice or advert to the law principally, if not entirely, statutory, relating to new parishes, such as distinct and separate parishes, district parishes, district chapelries, consolidated chapelries, particular districts, formed under the Church Building Acts (58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 3 Geo. 4, c. 72; 5 Geo. 4, c. 103; 7 & 8 Geo. 4, c. 72; 1 & 2 Will. 4, c. 38; 1 & 2 Vict. c. 107; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 60; 6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94; 8 & 9 Vict. c. 70; 14 & 15 Vict. c. 97; 19 & 20 Vict. c. 55; 19 & 20 Vict. c. 104; 32 & 33 Vict. c. 94; 34 & 35 Vict. c. 82; 36 & 37 Vict. c. 50); as to which, see Trower on the Building of Churches.

I. *The Origin of Advowsons, and how many kinds there are.*

Advowsons are of three kinds:

1. Presentative; 2. Donative; and
3. Collative.

1. *Presentative Advowson.*

A presentative advowson is, the right of presenting a clerk to be incumbent of a church, by institution and induction. This right was originally gained by persons who either founded or endowed the church, or gave the site whereon it was built; they are usually termed patrons, and their right of presentation, the right of patronage. Co. Litt. 119 b.

Churches were in general founded by lords of manors for the use of their tenants; hence they were originally *appendant* to, and passed by a mere grant of, the manor without saying “with the appurtenances” (Ib. 307 a). They may also be *appendant* to other corporeal hereditaments, as a castle, house, parsonage, church, demesne of a manor, or a certain number of acres, or an acre, of land (Ib. 121, 122 a; *Tyrringham’s Case*, ante, 122; *Potter v. Sir H. North*, 1 Vent. 386; *Hill v. Grange*, Plowd. 170); but not to anything incorporeal, as a reversion. *Fulmerston v. Steward*, Plowd. 103.

Formerly a grant of a manor by the Crown would pass an advowson *appendant*, without naming it, or so much as using the word *appurtenances* (Staunf. Prærog. 42 a; 10 Co. 64 a); but by 17 E. 2, stat. 1, c. 15, *De prerogativa regis*, the king’s grant of a manor will not pass an advowson *appendant* to it, without express mention of it. But words of reference have been held sufficient. *Whistler’s Case*, 10 Co. 63 a; Co. Litt. 121 b; Harg. note 173; and see Bac. Abr. Prærog. (F) 2.

Where a contract for a sale of a

manor "with the appurtenances" is entered into between subject and subject, an advowson appendant to the manor will be included, although at the time of the contract it was not known to either party to be appendant, and the sale of it therefore was not in their contemplation (*Attorney-General v. Sitwell*, 1 Y. & C. Exch. Ca. 559, 583); but the statute *De prerogativa regis*, before cited, alters the law, so far as the Crown is concerned. See *Attorney-General v. Sitwell*, 1 Y. & C. Exch. Ca. 559.

There are also advowsons *in gross*; that is to say, where the right of presentation is attached to the person, and is not appendant to any corporeal hereditament. An advowson of this kind may have been so originally, as where the person who merely built the church became the patron (*Mirehouse*, Advow. 13), or, where it was severed from a manor either by an exception of the advowson from a grant of the manor to which it was appendant (*Fulmerston v. Steward*, Plowd. 103), or by a grant of the advowson, without the conveyance of the manor or other corporeal hereditament to which it was appendant. *Ive's Case*, 5 Co. 11; *Fulmerston v. Steward*, Plowd. 103.

A lease of the corporeal hereditament for a freehold interest as for life, would render the advowson in gross during the existence of the lease (*Ib.*; see also *Hartopp and Cock's Case*, Hutt. 88; Co. Litt. 325 a); but, if the lease be for a term of years, the advowson would still continue appendant (*Lilford's*

Case, 11 Co. 50; *Rooper v. Harrison* 2 K. & J. 86).

If there be a complete severance of the advowson from the hereditament to which it is appendant, it can never become appendant again; even although the hereditament and the advowson come again into the hands of the same party. *Arthington v. The Bishop of Chester*, 1 H. Black. 426; *Rex v. The Bishop of Rochester*, 1 Mod. 1; and see *Delacherois v. Delacherois*, 7 Ir. Com. L. Rep., N. S. 65; 11 H. L. Ca. 62.

If, however, the severance be only conditional, the advowson will only remain in gross, until the condition be fulfilled. Thus, where the lord mortgages a manor in fee excepting the advowson (which thereby becomes in gross), if the money be paid on the appointed day, the advowson becomes appendant again; but, if the money be paid *after* the day, the appendancy is destroyed, although, being appendant in reputation, it may pass by the name of an advowson appendant. *Rex v. The Bishop of Chester*, 2 Salk. 24.

Where, however, the severance takes place by operation of law, as, for instance, by a partition of a manor between coparceners, the advowson, in the absence of any express exception, will remain appendant, and each coparcener will present in turn. *Ib.* 25; 1 Ld. Raym. 292.

If, upon partition, the whole demesnes are allotted to one coparcener, and the services to the other (by which means the manor is destroyed, and the advowson becomes in gross), and one of them

dies without issue, so that the demesnes descend to the one who has the services, the manor is revived, and the advowson again appendant. *Reynolds v. Blake*, 2 Salk. 25; 1 Ld. Raym. 198; *Wyat Wild's Case*, 8 Co. 79 b; *Sir Moyle Finek's Case*, 6 Co. 64; *Rex v. The Bishop of Chester*, 2 Salk. 25.

Where the severance of an advowson from the hereditament to which it is appendant is effected by a wrongful act, it may be rendered appendant again by defeating such wrongful act. Co. Litt. 363 b.

An advowson may be partly appendant and partly in gross; as where a person having an advowson appendant grants every other presentation to a third party, it will be appendant for the turn of the grantor, and in gross for the turn of the grantee. *Anon.*, Dy. 259 a; and see *Marshe and Smith's Case*, 1 Leon. 56; Dod. Adv. 60.

Where by a private act, providing for the sale of part of the glebe and the erection with the proceeds of an additional church, it was provided, that the curate thereof should, during the incumbency of the then rector, be appointed by him, and that on the avoidance of the rectory by his death, &c., the new church was to become the principal church, with all the rights of a mother church, and the old one be deemed a chapel of ease thereto, and that the presentation thereof, as well as of the new church, should be vested in the patron of the rectory and his heirs; so, nevertheless, that the minister of the chapel should not be removable at pleasure; it was held by the Court of Common Pleas, that

such chapel of ease was made thereby *presentative* and not *donative*. *Regina v. Lord Foley*, 2 Man. G. & S. 664.

2. Donative Advowson.

A donative advowson is a right of nomination to a church, chapel, or vicarage, by the patron alone, subject to his visitation only, without presentation, institution, or induction, which, as we have seen, are necessary in the case of a presentative advowson. *Fairechild v. Gayre*, Cro. Jac. 63; *Powell v. Milburn*, 3 Wils. 365.

It seems that before the Lateran Council, according to Bracton, all benefices were what donatives are now, for they neither lapsed, nor had bishops the right of institution thereto; afterwards patrons might have presented their clerks to bishops for presentation. The present donatives are probably either such only as escaped the influence of the canon law, or may have owed their origin to foundation by the crown, royal licence, or letters patent. See Mirehouse on Advow. 21, 22; *Repington v. The Governors of Tamworth School*, 2 Wils. 151.

It is said, however, that if the patron of a donative presents to the ordinary, and suffers an admission and institution thereupon, he thereby makes it always presentative. Co. Litt. 344; *Fairechild v. Gayre*, Cro. Jac. 63; and see *Regina v. Lord Foley*, 2 Man. G. & Sc. 664.

It was held, however, by Holt, C. J., and Powell, J., that though a presentation might destroy an impropriation, yet it could not destroy a donative, because the crea-

tion thereof was by letters patent. *Ladd v. Widdows*, 1 Salk. 541; 3 Salk. 140.

The ordinary has no power of visitation or deprivation over the incumbent of a donative (1 Inst. 122; Co. Litt. 344 a); nor can he interfere with the church, as by the regulation of seats (*Walter v. Gunner*, 1 Hagg. 319); and he has jurisdiction only over the incumbent for personal offences (*Colefatt v. Newcomb*, Ld. Raym. 1205; *Powell v. Milburn*, 3 Wils. 355, 365). Where, however, donations are augmented by Queen Anne's bounty they become by such augmentation subject to the visitation and jurisdiction of the bishop (1 Geo. 1, stat. 2, c. 10, s. 14), provided the augmentation has taken place with the consent of the patron in writing (Sect. 15).

Where a vacancy occurs in a presentative advowson during the life of the ancestor, in case of his death before presentation, his executor will present (post, 262); in the case of a donative, the heir at law will have the right of nomination. *Repington v. The Governors of Tamworth School*, 2 Wils. 150.

Upon the acceptance by the incumbent of a presentative advowson of a bishopric, the crown will have the next presentation (post, 261), but it will not if the advowson be donative. *Attorney-General v. Bishop of London*, 4 Mod. 213; 1 T. R. 399.

A donative with cure of souls is within the act of uniformity when with cure of souls (*Powell v. Milburn*, 3 Wils. 355), and also within the statutes of simony. Ib. 365.

The resignation of a donative should be made to the patron, and if there be two, it will be sufficient if it be made to one. *Fairchild v. Gayre*, Cro. Jac. 63.

Donatives, moreover, do not ordinarily lapse, see post, p. 273.

3. Collative Advowsons.

A collative advowson is where the right of nomination is vested in a bishop either originally or by lapse. The act of collation by the bishop is equivalent to both presentation and institution in the case of a presentative advowson, and induction is only necessary. *Mirehouse, Advow.* 40.

Although a church in ordinary cases is full, by institution, and cannot (except in the case of the crown) be revoked even before induction (Ib. 41); this is not the case after a collation. Hence, if a bishop collate without title, and his clerk is inducted, and six months elapse, the rightful patron will not be put out of possession; and he may present without being compelled to take legal proceedings, although a similar collation might take away the right that is in another bishop. Co. Litt. 344 b; 2 Inst. 358; 7 Anne, c. 18; *Boswel's Case*, 6 Co. 50 a; *Green's Case*, 6 Co. 29 b; *Gawdy v. Archbishop of Canterbury*, Hob. 301; *Stanhope v. The Bishop of Lincoln*, Hob. 242.

If a bishop, after collating to a church, dies before the induction of the clerk, the crown, as having the temporalities of the vacant see, will be entitled to the right of presentation, and not the successors or executors of the bishop. Co. Litt. 90 b,

n. 4; Fitz., N. B. 34, 36. As to collation upon lapse, see post, 270.

II. Appropriations.

Where the presentee has, during his life, the freehold in himself of the parsonage house, glebe, tithes, and other dues, he is called the parson or rector. Where, however, these have been appropriated by some spiritual corporation, either sole or aggregate, termed appropriators, or by lay appropriators, the presentee is called a vicar, and in general has only a small portion of the profits of the benefice, the rest going to the appropriators. *Grendon v. Bishop of Lincoln*, Plowd. 493.

Appropriations seem to have owed their origin to the religious houses (previous to the Reformation) getting possession by appropriation of numerous advowsons, and after providing a clerk, whom they paid with a small part of the revenues of the living, applied the rest for the purposes of their own communities. The statutes 15 Rich. 2, c. 6, and 4 Hen. 4, c. 12, provided for the sufficient endowment of vicarages upon the appropriation of rectories. On the dissolution of the monasteries, by 27 Hen. 8, c. 28, and 31 Hen. 8, c. 13, appropriations were vested in the crown, and many grants were made of them to laymen. See further on this subject 3 Steph. Comm. 19; Mirehouse, 83.

Whenever a rectory was thus appropriated by a spiritual corporation, and the vicarage endowed as before mentioned, the advowson of the vicarage became appendant

to the rectory, but when severed therefrom, it became an advowson of a vicarage in gross, and required to be conveyed by deed, as it would no longer pass as appendant to the rectory. *Sherley v. Underhill*, Mo. 894; *Anon. Dyer*, 350 b.

In some cases of appropriation there is no vicar, but a permanent minister, termed a perpetual curate. See *Doe v. Thomas*, 9 Ad. & Ell. 556; *Hine v. Reynolds*, 2 Mann. & Gr. 71; *Doe d. Brammall v. Collinge*, 7 C. B. 939; 1 Geo. 1, stat. 2, c. 10, ss. 4, 21.

Sinecure rectories are now abolished. 3 & 4 Vict. c. 113, s. 48. See Trower on the Building of Churches, 18.

III. On Unions.

It seems that by common law, where churches were too poor and unable to support the charges to which they were subjected, they might be consolidated or united with the consent of the parson, patron, and ordinary. *Harman v. Renew*, 1 Salk. 165; *Austyn v. Twyne*, Cro. Eliz. 500; *Reynoldson v. Blake, and the Bishop of London*, 1 Ld. Raym. 192.

The legislature also has provided for the disunion of benefices.

The statutes concerning unions (37 Hen. 8, c. 21; and stat. 17 Car. 2, c. 3), which did not alter the common law upon the subject, have since been repealed by 1 & 2 Vict. c. 106, which, together with the subsequent acts of 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 113; 4 & 5 Vict. c. 39; 13 & 14 Vict. c. 98; 18 & 19 Vict. c. 127; 23 & 24 Vict. c. 142; 32 & 33 Vict. c. 94; and

34 & 35 Vict. c. 90, now regulate the law upon the union and disunion of benefices.

It may be here mentioned that the incumbent of the church of every parish, or new parish for ecclesiastical purposes, authorized to marry, church, and baptize in such church, and to receive for his own use the entire fees for such offices, is now styled vicar, and his benefice a vicarage. 31 & 32 Vict. c. 117.

IV. *On Presentations.*

A presentation has been defined to be "the offering of a clerk to the ordinary, to be instituted to the church." Co. Litt. 120 a.

Since the Statute of Frauds (29 Car. 2, c. 3), presentations must be made to the bishop in writing, and by 55 Geo. 3, c. 184, they must be stamped.

The crown as head of the Church of England presents to all benefices not belonging to other patrons (1 Eliz. c. 1), or which belong to an archbishopric or bishopric, and which become void during the vacancy of the see (Bro. tit. Presentment, 10, 13); or which (not being donatives, ante, p. 259) are in the possession of incumbents on their being made English bishops (*Basset v. Gee*, Cro. Eliz. 790; *Wentworth v. Wright*, Ib. 526; *Woodley v. Bishop of Exeter*, Cro. Jac. 691; *Colt and Glover v. The Bishop of Coventry*, Hob. 140; *Troward v. Cailland*, 6 T. R. 439), or bishops of Sodor and Man (*The Queen v. Eton College*, 8 Ell. & Bl. 632, per Lord Campbell, C. J.); but it is doubtful whether the prerogative of the crown extended to the case of an

English incumbent promoted to a bishopric in Ireland, even before its disestablishment (Ib.). And it has been held not to extend to the case of an appointment to the bishopric of Christchurch, in New Zealand. *The Queen v. Eton College*, 8 Ell. & B. 610.

The right of the crown to present to an English benefice upon the appointment of the incumbent by the crown to an English bishopric, is not barred by the crown having before such appointment granted the advowson to a subject. Ib.

The Lord Chancellor, or keeper of the great seal, has the right to present to such of the livings of the crown as are below the value of 20*l.* in the King's Books, according to the valuation in the time of Henry the Eighth, and there is no difference in the form of a presentation by the king or the chancellor, save that for the most part the one is mandantes the other rogantes (*Lord Chancellor's Case*, Hob. 214). See 22 & 23 Vict. c. 43, s. 12, as to benefices where the patronage is vested in the crown, to which the provisions of the Inclosure Acts are applicable.

Many of the livings in the gift of the Lord Chancellor being very inadequately endowed, Lord Chancellor Westbury endeavoured to remedy this evil by the Lord Chancellor's Augmentation Act (26 & 27 Vict. c. 120), which came into operation on the 1st of November, 1863. By this act power is given to the Lord Chancellor to sell the advowsons included in the first schedule thereto, and to apply the purchase money or compensation received for each advowson in the augmentation

of the income thereof; and to sell some of such benefices, and to apply the proceeds in the augmentation of poor benefices remaining in his gift.

Where the Lord Chancellor presents to a living over the value of 20*l.* in the King's Books at the time before mentioned, the crown may, even after admission and institution (*Bedinfield v. Archbishop of Canterbury*, Dy. 292; *Walrond v. Pollard*, Dy. 293; *Green's Case*, 6 Co. 29), but not after induction (*Lord Chancellor's Case*, Hob. 214), revoke the presentation. But the first presentation will remain good, if the second were obtained by fraud. *Green's Case*, 6 Co. 29.

The crown may by its own act revoke its presentation at any time before induction (Co. Litt. 344 b; 2 Roll. Abr. 353), or such presentation may be revoked in law, as by the death of the king (Godolp. Repert. 266); or (even although the crown be only entitled to one turn) by the death of the clerk before induction, and the king may present again. *Thomas Holt's Case*, 9 Co. 132 b; *Gyles v. Colshil*, Dy. 360 b; *Sheffield v. Ratcliffe*, Hob. 339; *Hutchins v. Glover*, Cro. Jac. 463; *Wright v. The Bishop of Norwich*, 1 Leon. 156.

If the crown has only two parts of an advowson, and a subject the remaining part, inasmuch as no subject can be tenant in common with the crown, the crown alone will have the right of presentation. *The Chancellor of Cambridge v. Walgrave*, Hob. 127.

All persons having an interest, whether in fee, in tail, for life or for years, in an advowson, appendant or

in gross, may present on the occurrence of a vacancy. *Mirehouse*, 138; *Amb.* 166.

Moreover, a person entitled for life to the interest of the proceeds of an advowson directed to be sold will, upon the advowson becoming vacant before a sale, be entitled to present thereto, even although the neglect of trustees to sell amount to a breach of trust. *Briggs v. Sharp*, 20 L. R., Eq. 317; *Hawkins v. Chappel*, 1 Atk. 621.

Where the advowson is in fee, if it be not devised, as a general rule it descends to the heir. Co. Litt. 388 a.

Where, however, the vacancy occurs during the life of a patron seised in fee, who dies without having presented a clerk, the next presentation is considered a chattel, and goes to his personal representative (*Mirehouse v. Rennell*, 8 Bing. 490, 1 C. & F. 527; *Rennell v. Bishop of Lincoln*, 3 Bing. 223; 7 B. & C. 113); except where the patron is also incumbent, in which case the advowson descends to his heir (*Holt v. Bishop of Winchester*, 3 Lev. 47; *Harris v. Austen*, 3 Bulst. 47); unless he have devised the next presentation, which will be good although the church became void by his death. 1 Leon. 205; *Harris v. Austen*, 2 Roll. Rep. 214.

Where, however, a patron presents, and dies before his clerk is admitted, and his executors present another, both these presentations are good, and the bishop may receive which of the clerks he pleases. *Mirehouse*, 139.

During coverture the husband of a woman having an advowson in

fee presents jointly with her in both their names, and after her death, if they had issue who might have inherited, he will present as tenant by the curtesy (Co. Litt. 29 a, 120 a, 166 b, 388 a). And if he die during a vacancy, without having presented a clerk, his executor, and not the heir of the wife, will have the presentation. *Ib.*

Where a husband dies seised of an advowson which descends, the heir will have the next two presentations, the widow the third, by right of her dower. *Ib.* 32 a.

An infant, whatever may be his age, and not his guardian, will present. *Shoplane v. Roydler*, Cro. Jac. 98; Co. Litt. 17 b, 89 a; *Hearle v. Greenbank*, 3 Atk. 710.

Where the owner of an advowson is lunatic the Lord Chancellor presents to the living, usually giving it to a member of the family; this right seems to have been first exercised by Lord Talbot, whose example has been followed by all his successors (Shelf. Lun. 11; 1 Woodes. Lect. 409; Phillips, Lunacy, 384). As to a Roman Catholic becoming a lunatic, see p. 264, post.

Joint tenants must concur in a presentation, but if they present different clerks the bishop may admit any one of them, or refuse all. In the latter case, unless the joint tenants concur in the presentation, he may, after six months, present by lapse (Co. Litt. 186 b). Joint tenants, however, may make a partition to present in turns (*Bishop of Salisbury v. Philips*, Ld. Raym. 535; 1 Salk. 43). Where, however, there are two incumbents to an advowson, one part of the

church may be allotted to one, another part to the other. *Smith's Case*, 10 Co. 135 b; *Holland's Case*, 4 Co. 75; *Windsor's Case*, 5 Co. 102; Co. Litt. 17 b.

Where an advowson is in trustees and their heirs upon trust to present, being joint tenants, they must all join in the presentation. *Att.-Gen. v. Scott*, 1 Ves. 413; *Wilson v. Kershaw*, 7 Bro. P. C. 296, Toml. ed.; *Seymour v. Bennet*, 2 Atk. 482.

If tenants in common cannot concur in a presentation, the right to present will be determined by lot. See *Johnstone v. Baber*, 6 De Gex, Mac. & G. 439; reversing *S. C.*, 22 Beav. 562.

Where an advowson descends to coparceners, and they cannot agree to present, the law gives the first presentation to the eldest, and Lord Coke says, "this privilege shall descend to her issue; nay, her assignee shall have it, and so shall her husband that is tenant by the curtesy have it also" (Co. Litt. 166 b; *Gully v. Bishop of Exeter*, 10 B. & C. 584); the alienee of the elder sister would have the like privilege. *Barker and Cooke v. The Bishop of London*, Willes, Rep. 659.

An advowson being an entire inheritance, the only mode of effecting a partition of it between parties jointly interested therein as joint tenants, tenants in common, or coparceners, is by presentation to it in turn (Co. Litt. 164 b), or by lot (*Johnstone v. Baber*, 6 De Gex, Mac. & G. 439); and this may be effected either by an action in the Chancery Division or by arrangement between the parties. *The*

Bishop of Salisbury v. Philips, 1 Salk. 43; Carthew, 505; and see 7 Ann. c. 182.

But under the present law the Court would, it seems, in the case of any advowson, order it to be sold, and the proceeds to be divided among the parties according to their interests. *Young v. Young*, 13 L. R., Eq. 174, cited; and see note to *Agar v. Fairfax*, 2 L. C. Eq. 446, 5th edit.

Where the clerk presented by a coparcener, having been complete incumbent and the church full, is afterwards deprived, the turn is gone (*Windsor's Case*, 5 Co. 102); but where the church remains void, in consequence of the clerk, after presentation, institution and induction, not having conformed to certain statutes, as by neglecting to read the articles, the coparcener may present again. *Windsor v. The Archbishop of Canterbury*, Cro. Eliz. 687; Moo. 558; *Baker v. Brent*, Cro. Eliz. 679.

Corporations present by their true name and under their common seal. *Ayray v. Sir R. Lovelas*, 1 Bulst. 91; see *Mayor and Burgesses of Stafford v. Bolton*, 1 Bos. & Pul. 40.

The presentation of benefices belonging to papists is vested by 1 Will. & Mary, c. 26; and 12 Ann. stat. 2, c. 14, s. 1, in the universities of Oxford and Cambridge (see also 3 Jac. 1, c. 5); those south of the Trent belonging to Oxford, those north of that river to Cambridge. Hill, Trustees, 450, n.

Trustees of Roman Catholics are also disabled from presenting (1 Will. & M. c. 26, s. 3); and the

trustees incur a penalty of 500*l.* if they present to a benefice without giving notice of the avoidance to the vice-chancellor of the university to which the presentation belongs (s. 4).

Moreover, every grant of any advowson or right of presentation or nomination to any benefice by Roman Catholics, or their trustees or mortgagees, is null and void unless it be for a valuable consideration to a protestant purchaser. 11 Geo. 2, c. 17, s. 5.

These disabilities of Roman Catholics are not taken away by 10 Geo. 4, c. 7. See s. 16.

Where a papist entitled to an advowson becomes lunatic, it seems to be doubtful whether either of the universities would have a right to present, as it might lie in the crown. See *In re Vavasour*, 3 Mac. & G. 275; where Lord Truro, C., declined to make an order for the sale of the next presentation of a Roman Catholic lunatic to an advowson settled upon him.

In the same case it was held that the 28th section of 1 Will. 4, c. 65, conferred no power to sell the right to the next presentation to the rectory, of which the lunatic was tenant in tail, except for one of the purposes specified in the section. *Ib.*

Where there are two tenants in common of an advowson, one a protestant and the other a papist, the right of presentation devolves on the protestant alone. *Edwards v. Bishop of Exeter*, 5 Bing. N. C. 652.

Where any right of presentation to any ecclesiastical benefice belongs to any office in the gift or appointment of the crown, and such office

should be held by a person professing the Jewish religion, the right of presentation will devolve upon the Archbishop of Canterbury for the time being. 21 & 22 Vict. c. 49, s. 4.

Where the legal interest in an advowson is vested in trustees, the legal act of presentation must be exercised by them, but (unless they are by the terms of the trust empowered also to nominate) they are bound to present the nominee of the beneficial owner (*Barrett v. Glubb*, 2 Black. 1052; *Boteler v. Allington*, 3 Atk. 458; *Earl of Albemarle v. Rogers*, 2 Ves. jun. 477; *Attorney-General v. Forster*, 10 Ves. 335, 338; *Attorney-General v. Newcombe*, 14 Ves. 1, 7), even although he be an infant. *Arthington v. Coverley*, 2 Eq. Ca. Ab. 518, pl. 3.

Where the trusts of the advowson are expressly declared, no difficulty can arise in determining who is to present on a vacancy.

Even where general words are made use of in a will, which carry the beneficial interest to a definite cestui que trust, he will be able to exercise the right of nomination, although it be not expressly given to him. *Earl of Albemarle v. Rogers*, 7 Bro. P. C. 522, Toml. edit., affirming the decision reported of Lord Loughborough, C., 2 Ves. jun. 477.

Where devisees take the legal estate as trustees, but the beneficial interest is not disposed of, the right to nominate will result to the heir-at-law. *Kensley v. Langham*, Ca. t. Talb. 143; *Sherrard v. Lord Harborough*, Amb. 165; *Martin v. Martin*, 12 Sim. 570; and see *Edenborough v. Archbishop of Canterbury*, 2 Russ. 93; see however

and consider *Bristow v. Skirrow*, 27 Beav. 590.

Trustees having the power of presentation may present to one of themselves, where the presentee is one of certain classes of objects, from amongst whom the testator has directed the trustees to make a selection. *Potter v. Chapman*, Amb. 98.

Unless they can come to some arrangement amongst themselves, individual cestuis que trust having a power of nomination must all join (*Seymour v. Bennet*, 2 Atk. 483); but where an advowson is held in trust for the inhabitants or parishioners of a place, the trustees must present the nominee of the majority of the electors. *Fearon v. Webb*, 14 Ves. 13; *Attorney-General v. Rutter*, 2 Russ. 101, n.; *Edenborough v. Archbishop of Canterbury*, 2 Russ. 108.

In general where the trust of an advowson is for the parishioners or inhabitants of a parish generally, the right of voting for the nomination of a clerk has been confined to parishioners paying church and poor rates (*Attorney-General v. Parker*, 3 Atk. 576, 577; *Attorney-General v. Forster*, 10 Ves. 335; *Attorney-General v. Newcombe*, 14 Ves. 1; *Fearon v. Webb*, 14 Ves. 13; *Attorney-General v. Rutter*, 2 Russ. 101, n.; *Edenborough v. Archbishop of Canterbury*, 2 Russ. 93; and see *Carter v. Cropley*, 8 De G., Mac. & G. 680; 3 Jur., N. S. 171); but the usage of so confining the right of voting ought to be certain and invariable (*Edenborough v. Archbishop of Canterbury*, 2 Russ. 93, 107), and all housekeepers will have a right to vote if there has been a

usage for them to join in elections. *Attorney-General v. Parker*, 3 Atk. 577.

Where ratepayers have a right to vote, "a person who comes into the parish after a rate has been made, and offers to vote before another rate has been made, has no right to vote, unless the making of the rate has been postponed for an unfair purpose." Per Lord Eldon, C., in *Edenborough v. Archbishop of Canterbury*, 2 Russ. 110. And it seems that Jews, but not Roman Catholics, are entitled to vote. *Ib.* 111, n.

It was formerly held that the mode of voting must be by open polling and not by ballot, because the latter mode of polling, it was said, did not afford the opportunity for a scrutiny. *Edenborough v. Archbishop of Canterbury*, 2 Russ. 93, 108, 109; *Faulkner v. Elger*, 4 B. & C. 449. It has, however, been recently laid down that as the present mode of voting by ballot is free from that objection, there is nothing invalid in a resolution by a parish that the election shall take place by ballot. *Shaw v. Thompson*, 3 Ch. D. 233.

The mode in which the election is to take place, especially the times and hours for polling, rests in the determination of the parishioners (*Attorney-General v. Newcombe*, 14 Ves. 1, 9; *Attorney-General v. Forster*, 10 Ves. 335; *Shaw v. Thompson*, 3 Ch. D. 233). And it seems that the irregular or even illegal conduct of the churchwardens, at a meeting for determining the mode of the election, will not induce the Court to interfere, so as to disturb the election, in the absence of evidence of any voter having been deprived of an opportunity of voting (*Shaw v.*

Thompson, 3 Ch. D. 233). The general principle upon which the Court has acted in such cases being, that where the election is substantially fair, and the majority not likely to be disturbed by any change in the manner and form of voting, it will not interfere. *Ex parte Mawby*, 3 E. & B. 718; *Reg. v. St. Mary, Lambeth*, 3 Nev. & Per. 416; *Shaw v. Thompson*, 3 Ch. D. 251.

It may be here mentioned that a recent act of parliament authorizes the sale of advowsons in cases where the same are vested in, or in trustees for, inhabitants, ratepayers, freeholders or other persons, forming a numerous class, and deriving no pecuniary advantage therefrom, in order that the monies arising from such sales may be applied to the erection, rebuilding or improvement (where necessary) of parsonage houses, and to the augmentation of the livings (where they are small), and to other beneficial purposes there mentioned. 19 & 20 Vict. c. 50.

Trustees must all join in signing the presentation, otherwise the ordinary cannot be compelled to admit the clerk therein mentioned (*Attorney-General v. Scott*, 1 Ves. 413, 414; *Seymour v. Bennet*, 2 Atk. 483; *Wilson v. Dennison*, Ambl. 82; and see Co. Litt. 186 b). A majority, however, of the trustees having power to present, whether power be expressly given to them (*Attorney-General v. Scott*, 1 Ves. 413; *Attorney-General v. Cuming* 2 Y. & C. C. C. 139; *Wilson v. Dennison*, Amb. 82) or not (*Attorney-General v. Scott*, 1 Ves. 413), may by action in the Chancery Di-

vision compel the minority to join in the presentation to the bishop.

If due notice of the meeting to elect a clerk be not given to all the trustees, the election will be void (*Attorney-General v. Scott*, 1 Ves. 413; and see *Attorney-General v. Cuming*, 2 Y. & C. C. C. 139), and the trustees cannot vote, though they may sign the presentation, by proxy. *Attorney-General v. Scott*, 1 Ves. 413, 417; *Wilson v. Denison*, Amb. 82, 86.

A declaration that the trustees are to elect and present within a certain number of months or days (*Attorney-General v. Scott*, 1 Ves. 413, 415), or to elect new trustees, when the trustees are reduced to a particular number (Hill on Trustees, 453), will be construed as directory only, and an appointment of a clerk will not be vitiated although it be made after the prescribed period (*Attorney-General v. Scott*, 1 Ves. 413, 415), or although the required number of trustees has not been kept up (Ib.; *Attorney-General v. Cuming*, 2 Y. & C. C. C. 139); and a presentation by a sole surviving trustee (*Attorney-General v. Floyer*, 2 Vern. 748), or even by the heir-at-law of the survivor (*Attorney-General v. Newcombe*, 14 Ves. 1, 12), has been supported.

The Chancery Division, however, in such cases will take care that in future the number of trustees shall be filled up (*Attorney-General v. Bishop of Lichfield*, 5 Ves. 825); and also before a new election, if it becomes necessary in case of the appointment being set aside. *Attorney-General v. Scott*, 1 Ves. 419.

As a general rule a purchaser is entitled to any benefit accruing to

the estate after the contract has been entered into but before the conveyance. Hence, it would seem to follow that where, after a contract to purchase an advowson, a vacancy occurred, the purchaser would have the right of presentation, although the conveyance were not then executed. In a case, however, where the purchaser of an advowson had objected to the title for several years without filing a bill, the right to present was altogether denied to him (*Wyvil v. Bishop of Exeter*, 1 Price, 292); but this case is said to be of doubtful authority (Dart, V. & P. 250, 5th ed.; Sugd. V. & P. 242, 13th ed.). A purchaser, however, claiming a right to present in such a case, ought to accept the title. Ib.

Although a mortgagee of an advowson may obtain a decree for foreclosure or sale (*Mackenzie v. Robinson*, 3 Atk. 559; *Gardiner v. Griffith*, 2 P. Wms. 403; *Long v. Storie*, 3 De G. & Sm. 308), or may himself sell under a power for that purpose, nevertheless, as he is, until sale or foreclosure, but in the nature of a trustee for the mortgagor, he will be compelled to present the nominee of the mortgagor, even although there be an express agreement that the mortgagee shall have the presentation. *Jory v. Cox*, Prec. Ch. 71; *Amhurst v. Dawling*, 2 Vern. 401; *Gally v. Selby*, Stra. 403; *Robinson v. Jago*, Bunb. 130; *Kensley v. Langham*, Ca. t. Talb. 143; *Mackenzie v. Robinson*, 3 Atk. 559, overruling *Gardiner v. Griffith*, 2 P. Wms. 403.

On the bankruptcy of the patron of a living, the advowson may be sold, as may also a right to next

presentation. But if the church be void at the time of the sale, then the next presentation cannot be sold, but the bankrupt himself shall present. Shelf. Bankruptcy, 401; 12 & 13 Vict. c. 106, s. 147 (repealed by 32 & 33 Vict. c. 83; and in this respect re-enacted by 32 & 33 Vict. c. 71, s. 15, subs. 4).

It is laid down in an old text-book of considerable authority that aliens, traitors, felons and outlaws, are incapable of exercising the right of presentation, but where the legal estate is vested in them, that right is forfeited to the crown (Wats. 106). There might be a question how far the trustees for such persons would become entitled to present for their own benefit, to the exclusion of the title of the crown. Hill, Trustees, 450.

Formerly, if an alien born purchased an advowson, and the church became void, after office found that he was an alien, the crown was entitled to present. Watson's Clerg. Law, vol. 1, p. 179, ed. 1712.

It seems, however, that if an alien were naturalized he might present to a living. Steph. Comm. vol. 3, p. 716.

And now, by the Naturalization Act, 1870 (33 Vict. c. 14), sect. 2, it is presumed that he may (if not a Roman Catholic) hold an advowson and present to it in the same manner as a natural born British subject.

It seems that as forfeiture for treason and felony is now abolished by 33 & 34 Vict. c. 23, the convict on completion of his sentence or pardon might present (sect. 18). And probably the administrator appointed by the Crown would do so while he was undergoing his sen-

tence (sect. 9 et seq.). But the law regarding outlaws is not affected by 33 & 34 Vict. c. 23. See sect. 1.

A clergyman, however, with cure of souls is prohibited by law from charging the emoluments of his benefice (13 Eliz. c. 20). And a judgment entered up against a clergyman will not operate as a charge on the profits of his benefice under stat. 1 & 2 Vict. c. 110, s. 13 (*Hawkins v. Gathercole*, 6 D. M. & G. 1). The remedy of a creditor, as respects the profits of a benefice, with cure of souls, is by the writ of sequestration (Robs. on Bank. 3rd ed. 387). And where the clergyman is a bankrupt, the trustee may apply for the sequestration of the profits of the benefice. *Ib.* Sect. 88 of the Bankruptcy Act, 1869.

A patron may, it seems, revoke a presentation before, but not after, admission and institution (*The King v. The Bishop of Norwich*, Cro. Jac. 385; *Stoke v. Sykes*, Latch. 191; *Stoke v. Styles*, *Ib.* 253); and it seems if he present two clerks, although one may be after the other, the ordinary may choose either of the two. *Rogers v. Holled*, 1 Bro. P. C. 117, Toml. ed.; 2 Black. 1039.

Where the incumbent of a parish church presents himself to a district church within the parish, created under the statutes 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, the annual value of the two livings exceeding 1,000*l.*, the parish church becomes, under the provisions of the 1 & 2 Vict. c. 106, ss. 4, 11, ipso facto void. *Storie v. The Bishop of Winchester*, 9 C. B. 62; 17 C. B. 652.

As to the vacancy in an ecclesias-

tical benefice on the conviction of the holder for treason or felony, see 33 & 34 Vict. c. 23, s. 1.

V. *On the Examination of Persons presented.*

The bishop, as a spiritual judge, may refuse a presentee, on account either of personal disqualifications, as, for instance, his being under age, or a layman, or on account of his conversation being criminosus, or on account of his lack of ability. *Specot's Case*, 5 Co. 58; *Albany v. Bishop of St. Asaph*, Cro. Eliz. 119.

Unless the cause of refusal be for some crime of temporal cognizance, notice of his refusal of the presentee should be given by the bishop to the patron, and if a suit on account thereof should be brought against the bishop, he should state the cause of his refusal (whether it be temporal or spiritual), specially and directly, so that it may be properly tried. *Ib.*; see also *Colt v. Bishop of Coventry*, Hob. 148; *Hele v. The Bishop of Exeter*, 2 Salk. 539; 3 Lev. 313; 2 Inst. 632.

Where a bishop refuses a clerk, the latter has a remedy called a *duplex querela* against the former, to his next immediate superior, from whom an appeal lies to the Judicial Committee of the Privy Council. 36 & 37 Vict. c. 66, s. 21. Steph. Comm. vol. 3, p. 417, 7th ed.

So in a well-known case where the crown presented a clerk to a vicarage in its gift, and the bishop refused to admit him on the ground that he maintained unsound doctrine, on a *duplex querela* brought to the Archbishop's Court, the

judge, for the same reason, giving sentence confirming such refusal, it was held that an appeal lay to the judicial committee of the Privy Council, not to the Upper House of Convocation. *Gorham v. Bishop of Exeter*, 15 Q. B. 52; S. C., 2 Rob. Ecc. 1.

Where one person has the right of nominating a clerk, and another of presenting him, the latter may judge of his qualifications in the same manner as a bishop does, but if he make an objection to the nominee on the ground of immorality, that must be tried by a jury. *The King v. The Marquis of Stafford*, 3 T. R. 646.

A bishop has no right to demand from the presentee of a benefice, before he will institute him, a testimonial from the bishop of another diocese, in which the party has had cure of souls, of his honest conversation, ability and conformity to the ecclesiastical laws of England. It is only necessary for the presentee to obtain sufficient testimony if the bishop shall require it, from any competent quarter, without confining him to the sole discretion and opinion of his former bishop. *Marshall v. The Bishop of Exeter*, 7 C. B., N. S. 653; 13 C. B., N. S. 820; 3 L. R., H. L. 17, nom. *Bishop of Exeter v. Marshall*.

If the clerk be unfit, the bishop may object to institute him. But if the bishop refuses to institute, he is bound by law to state his objection in a precise and definite manner, so that the patron may be able to have the validity or truth of the objection tried by law; that is, by the common law courts if it be an

objection founded on immorality, and by the metropolitan if the objection be for error in doctrine or insufficiency of learning. Per Lord Westbury in *Bishop of Exeter v. Marshall*, 3 L. R., H. L. 52.

VI. *On Admission, Institution, Induction, and the necessary Acts of the Presentee.*

The ordinary being satisfied with the presentee, admits him as a fit person to serve the cure of the church (*Britton v. Ward*, 2 Roll. Rep. 100; *Wrighton v. Brown*, 3 Lev. 211); he then institutes him, by which ceremony the cure of souls is transferred from the bishop to the incumbent. *Dygby's Case*, 4 Co. 79; and see Cro. Car. 341.

The effect of institution is to give the incumbent a complete right as to spirituality, and to celebrate divine service (*Hare v. Bickley*, Plowd. 528; *Dygby's Case*, 4 Co. 79; *Boswell's Case*, 6 Co. 49), and the church becomes full, so that the patron cannot make a fresh presentation (*Hare v. Bickley*, Plowd. 528; *Dygby's Case*, 4 Co. 79; *Boswell's Case*, 6 Co. 49; Co. Litt. 344 a, b); or in the case of a person having only one right of presentation, he cannot present another (ante, p. 264); the clerk also gains an incipient right to the temporalities, and may take possession of them, and of their profits.

A refusal to institute is cognizable in the Ecclesiastical Courts. Godolph. Repert. 275.

By induction, which is very similar to livery of seisin on a feoffment, the clerk is invested with the temporalities or profits of the benefice

and full possession of the church; and he may then, but not before, grant, or lease, or claim a freehold in, or bring an action for, them. *Glover v. Shedd*, 1 Roll. Rep. 228; *Hare v. Bickley*, Plowd. 528; 2 Inst. 357; *Dygby's Case*, 4 Co. 79.

Induction generally takes place by letters of mandate from the bishop to certain clergymen, who deliver possession to the clerk of the church and glebe (see Mirehouse, 190). And if the bishop die or be removed before the issuing of a mandate or induction, the clerk may apply to the archbishop for a mandate. Ib. 193.

A clerk, however, in order that he may accept or retain a benefice, even although it be a donative to which, as we have seen, presentation, institution and induction are not necessary, must comply with certain requisitions; he must be of twenty-three years of age, and in priest's orders; he must read the proper prayers, subscribe to the declaration of conformity, take the oaths of allegiance and supremacy, and abjuration, subscribe the Thirty-nine Articles, and read them if it be a place with cure of souls, and also the ordinary certificate of his subscription of the Thirty-nine Articles as prescribed by the law. See 13 Eliz. c. 12, ss. 1, 3; 13 & 14 Car. 2, c. 4, s. 6; 1 Will. & Mary, c. 8, s. 7; 1 Geo. 1, c. 13, s. 2; 9 Geo. 2, c. 26; 6 Geo. 3, c. 53; *Powell v. Milburn*, 3 Wils. 355; Black. 851; *Green's Case*, 6 Co. 29; Mirehouse, Advow. 23.

VII. *Lapse.*

A person may cease to be a parson or vicar:—1. By death. 2. By

cession, or taking another benefice, as to which see 13 & 14 Vict. c. 98. See also as to provisions against plurality as regards persons holding cathedral preferments, 1 & 2 Vict. c. 106, s. 11; 4 & 5 Vict. c. 39; 13 & 14 Vict. c. 98, s. 11; deans of cathedrals, 13 & 14 Vict. c. 94, s. 5, extended by 23 & 24 Vict. c. 142; and heads of colleges, 13 & 14 Vict. c. 98, ss. 5, 6. See *Shaw v. Woods*, 5 Ir. Comm. L. Rep., N. S. 156, deciding that a vicar choral in Ireland may accept a benefice without vacating his office. 3. A person may cease to be a parson by consecration to a bishopric.

If the patron neglect to present within six calendar months after an avoidance, the presentation for that turn lapses to the bishop (*Catesby v. The Bishop of Peterborough*, Cro. Jac. 141; 6 Co. 62); after the expiration of another six months, if the bishop do not collate, the patronage devolves upon the metropolitan (*Grendon v. The Bishop of Lincoln*, Plowd. 498); and after his default for the same period, the presentation lapses to the crown as supreme patron (*Ib.*), although the lapse may have taken place during a former reign (*The King v. The Archbishop of Canterbury*, Cro. Car. 355); and the crown may present at any time. Plowd. 498.

Where a bishop is patron, after his neglect to collate for six months the benefice lapses to the metropolitan; and it seems the crown can never take by lapse unless the ordinary might have had it before him. *Boswell's Case*, 6 Co. 52; *Colt and Glover v. The Bishop of Coventry*, Hob. 154.

In case of the ordinary's death after lapse, the crown, and not his executors, shall present. *Colt and Glover v. The Bishop of Coventry*, Hob. 154.

In some cases the bishop may take advantage of a lapse *without giving notice* to the patron of the avoidance; as when it has been occasioned by death, creation, cession (*Le Roy v. Priest*, Sir W. Jones, 334; Doct. and Stud. Ch. 31, 202), or by statute, as by acceptance of a plurality or a living above eight pounds in the King's Books. *The King v. The Archbishop of Canterbury*, Cro. Car. 354; *Dygby's Case*, 4 Co. 78; 21 Hen. 8, c. 13; Dyer's Rep. 237 a.

Where the avoidance takes place by some act between the presentee and the ordinary, as where the ordinary refuses to institute the clerk for want of fitness (*Hele v. The Bishop of Exeter*, Salk. 539; *Slade v. Drake*, Hob. 295, 296; *Albany v. The Bishop of St. Asaph*, Cro. Eliz. 119), or in the case of his deprivation or resignation (*Anderson's Rep.* 16; 3 Leon. 45; *Bedinfield v. The Archbishop of Canterbury*, Dyer, 292), or on his avoidance of the benefice by canon or common law (4 Co. 75; 6 Co. 29), or of his not reading the Thirty-nine Articles (13 Eliz. c. 12, s. 8), a lapse will only take place six calendar months *after notice* from the ordinary to the patron. *Albany v. The Bishop of St. Asaph*, Cro. Eliz. 119.

But it is said, that in the case of an ecclesiastical patron, he is not entitled to notice of insufficiency, because he is competent to choose

an able clerk. 2 Roll. Ab. 364; 3 Steph. Comm. 75, 4th ed.

It seems, however, that in all cases where lapse would not occur without notice, if the ordinary, who ought to give notice, dies before it is given, no lapse can incur to his successor without notice by him. *Colt v. The Bishop of Coventry*, Hob. 154; Keilw. 49 b.

If a stranger presents, and his clerk being instituted and inducted, remains undisturbed by the patron for six months after induction, the patron has no remedy, even although he may have had no notice from the ordinary. *Elvis v. The Archbishop of York*, Hob. 318.

Where the bishop does not refuse a clerk, but delays his examination for six months, no lapse will take place, it being through the bishop's fault that the church is void. 2 Roll. Ab. 366.

If the bishop be both patron and ordinary, he will not have a double time allowed him to collate in; for the forfeiture accrues by law whenever the negligence has continued six months in the same person (Cripps, 506, citing Wats. c. 12; Gibs. 796). And also if the bishop does not collate his own clerk immediately to the living, and the patron presents, though after six months have elapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk. Ib.

For as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that, if the bishop himself be guilty of equal or greater negligence, the patron should be de-

prived of his turn. Ib.; 2 Inst. 273; Cruise, Dig. Tit. xxii. c. 11.

But if the ordinary or metropolitan has actually collated his clerk to the lapsed benefice, while the turn was respectively theirs, although the clerk be not inducted, and so the church be not completely full, it is a sufficient bar to the patron's presentment. Wats. c. 12; Cripps, 507.

If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage, if he presents before the archbishop has filled up the benefice, and that for the same reason. Yet the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the archbishop. For he had no permanent right and interest in the advowson as the patron had, but merely a temporary one, which, having neglected to make use of during the time, he cannot afterwards retrieve. Wats. c. 12.

It follows, therefore, that lapse is not an absolute forfeiture of the patron's right, but that another person thereby acquires a right which is yet not wholly lost to the patron; the forfeiture is not absolute until that right has been actually exercised by the ordinary or metropolitan. Cripps, 507.

The right of the crown to present after a lapse is not barred by time, and even if the patron present or the ordinary collate a clerk, who is instituted and inducted, the crown may oust him (*The Queen v. The Bishop of Lincoln*, Cro. Eliz. 119; *Cumber v. The Bishop of Chichester* Cro. Jac. 216; *Booton v. The Bishop*

of *Rochester*, Hutt. 24; *Beverley v. The Archbishop of Canterbury*, Owen's Rep. 3; *Bishop of Lincoln's Case*, Ib. 5); if, however, the clerk died, or was deprived or resigned, before presentation of another by the crown, as its right was to one turn only, which in that case would have been exhausted, the patron may then present and not the crown. *Beverley v. Cornwall*, Cro. Eliz. 44; *Cumber v. The Bishop of Chichester*, Cro. Jac. 216; *The King v. The Archbishop of Armagh*, 2 Str. 842; *The King v. The Bishop of Winton*, Cro. Jac. 53; *The Queen v. The Bishop of Norwich*, 4 Leon. 217; *Starkey v. Pool*, 1 Bulst. 28.

Where the crown is patron there is no lapse, but it seems that if the crown do not present, either when patron, or in case of a lapse, the ordinary may send a deputy to serve the cure, and sequester the profits of the church. Doctor and Student, Ch. 36, 219; Mirehouse, Advows. 176.

If the right to presentation be litigious and contested, and an action be brought to try the title, making the bishop a defendant, no lapse will occur until the question of right be decided. 3 Steph. Comm. 75, 4th ed.

Pending a suit in Chancery respecting the right of nomination or presentation to a benefice, the bishop has been restrained from taking advantage of the lapse, and exercising the right of presentation himself. *Edenborough v. Archbishop of Canterbury*, 2 Russ. 93, 111; *Attorney-General v. Cuming*, 2 Y. & C. C. C. 139, 145.

If a bishop collate wrongfully, as
T.L.C.

for instance, before the expiration of the six months allowed to the patron, or without having given notice when it is requisite to him, the patron may present a clerk, and if the bishop admits him, his own clerk is out *ipso facto*; if the bishop refuse to admit the patron's clerk, the patron has his remedy for the wrongful collation by the bishop, for though it bars lapse to the metropolitan it is no bar to the patron. *Brickhead v. The Archbishop of York*, Hob. 169; Mirehouse, 169.

A wrongful collation by the ordinary does not become rightful by time, if therefore the patron does not present within six months, the ordinary, if he wishes to take advantage of the lapse, must collate again after the expiration of that time. *Gawdy v. The Bishop of Canterbury*, Hob. 301; 2 Roll. Ab. 368; Co. Lit. 344 b.

Donatives do not lapse (Co. Litt. 344 b; *Britton v. Wade*, Cro. Jac. 515), unless they have been augmented by Queen Anne's bounty. 1 Geo. 1, stat. 2, c. 10, ss. 6, 7.

VIII.—*Alienation, Descent and Incidents of Advowsons.*

Advowsons may be sold by the patron or any person having a power of sale, such as a trustee, or mortgagee with a power of sale, provided the circumstances attending the sale do not bring it within the regulations against simony.

They may also be sold by order of the Chancery Division, or by the trustees of a bankrupt patron.

A court of equity will in proper cases enforce specific performance of a contract for the sale of an ad-

vowson (*Sweet v. Meredith*, 8 Jur., N. S. 637), or next presentation (*Nicholson v. Knapp*, 9 Sim. 326); and the purchaser of an advowson cannot claim compensation in respect of a mortgage which is a charge upon the living, but not upon the advowson, although the existence of such charge was not communicated to him. *Wood v. Majoribanks*, 7 H. L. Ca. 806; 3 De G. & J. 329; 1 Giff. 384.

In a suit to enforce an agreement for sale of a next presentation, the vendor may be restrained from presenting any clerk not nominated by the purchaser, and the injunction has even been extended so as to restrain the bishop from presenting, except on the like nomination, or from collating in the event of a lapse pending the suit. *Nicholson v. Knapp*, 9 Sim. 326; *Greenslade v. Dare*, 17 Beav. 502; Dart. V. & P. 1095, 5th edit.

A statement in the particulars of an advowson, that an avoidance of the preferment is likely to occur soon, operates simply as a caution to put the purchaser upon his guard. *Trower v. Newcome*, 3 Mer. 704; Sug. V. & P. 2, 13th edit.

An advowson, like other property, may be devised by will by a person entitled to the fee, or under a power. *Hatch v. Hatch*, 20 Beav. 105.

Before the Wills Act (1 Vict. c. 26) words of inheritance, or words of similar import, were required to pass the fee. Hence a devise of a "perpetual advowson" was, before the Wills Act, held only to confer an estate for life, as being considered descriptive of the subject

of the devise, and not of the entire interest in it. *Pocock v. Bishop of Lincoln*, 3 Brod. & B. 27.

The word "living" is ambiguous. It is sufficient to pass an advowson. On the other hand, as the law does not determine its meaning, it may by the context be restricted to a single presentation. See *Webb v. Byng*, 2 K. & J. 669.

A devise of "rents and profits" will include an advowson (*Earl of Albemarle v. Rogers*, 2 Ves. jun. 477; 7 Bro. P. C., Toml. ed. 522; *Sherrard v. Lord Harborough*, Amb. 167; *Cust v. Middleton*, 13 W. R. (L. J.) 249); but where the will devotes the "rents and profits" to purposes which can only be answered by money or money's worth; as the augmentation of poor livings (*Kensley v. Langham*, Ca. t. Talb. 143); investment in lands (*Sherrard v. Lord Harborough*, Amb. 165); or the maintenance of poor children (*Martin v. Martin*, 12 Sim. 579); in such case the right of presentation to a void living, not being the subject of profit, will result to the heir. 1 Jarm. Wills, 756, 3rd ed.

If a living is not void it may be sold for the purposes of a will like any other property. *Cooke v. Cholmondeley*, 3 Drew. 1; 1 Jarm. Wills, 756, 3rd ed.

Where an advowson is devised to trustees upon trust to sell, and there is no disposition of the beneficial interest, if before a sale has been effected a vacancy occurs, the right of presentation is not to be exercised by the trustee at his pleasure, but he must adopt the nomination of the testator's heir at law. *Hill v. Bishop of London*, 1 Atk. 618;

In re Shrewsbury School, 1 My. & Cr. 647; *Martin v. Martin*, 12 Sim. 579; *Sherrard v. Lord Harborough*, Amb. 165; *Cook v. Cholmondeley*, 3 Drew. 1; and see *Hawkins v. Chappell*, 1 Atk. 621.

Where, however, an advowson is devised to trustees upon trust to sell, and there is a disposition of the proceeds of sale, as for instance, to a person for life, if a vacancy occur before a sale takes place the tenant for life, and not the heir at law, will have the right to nominate a clerk to be presented to the living. *Briggs v. Sharp*, 20 L. R., Eq. 317.

Where trustees are directed to sell an advowson at a particular time, neither the trustees nor the Court can anticipate such time. See *Johnstone v. Baber*, 8 Beav. 233. There a testator devised an advowson to trustees to sell on the death of A. and divide the proceeds among certain persons. A. was the incumbent, so that on his death no sale could be made until the vacancy was filled up. It was held by Lord Langdale, M. R., that the Court had no jurisdiction to authorize a sale in the lifetime of A., on the ground that it would be beneficial to the parties.

Where a sum of money is given to trustees upon trust to invest in the purchase of an advowson for a particular individual, with a direction that until the fund was so invested it should be accumulated, and that the income of the accumulated fund should belong to such individual at the expiration of twenty-one years, it seems that he might be entitled to call for an immediate transfer of the fund. But

he clearly would not do so where he was not the exclusive object of the trust, as where the trustees might present another person to the benefice when purchased. *Gott v. Nairne*, 3 Ch. D. 278.

Where a testator before the passing of the Irish Church Act (32 & 33 Vict. c. 42), which destroyed Irish advowsons, made a will devising an advowson in Ireland, it was held that the compensation for the advowson was payable to the executor of the testator and not to his devisee, though the testator made a codicil to his will after the passing of the act. *Frewen v. Frewen*, 10 L. R., Ch. App. 610.

An advowson is descendible in the same mode as freeholds of inheritance at common law, and it will be assets in the hands of the heir (*Westfaling v. Westfaling*, 3 Atk. 464; Co. Litt. 17 b, 374 b). Formerly, where the advowson was in gross, the descent was to be traced from the person who last exercised the right of presentation (Co. Litt. 15 b); where the advowson was appendant or appurtenant to a manor, from the person who was last seised of the manor (Ib. n. 1, Hal. MSS.). Where, however, the death of the ancestor takes place subsequently to the year 1833, the descent must be traced from the purchaser. 3 & 4 Will. 4, c. 106, ss. 1, 2.

The advowson of a married woman having issue by her husband, who might inherit it, will on her death belong to her husband for his life as tenant by the curtesy, and he will consequently have the right to present upon a vacancy occurring (Co. Litt. 29 a; ante, p. 61); so

likewise the advowson of a husband will be liable to the dower (if it be not barred) of his widow, which however is not very valuable, as it is merely the third presentation, which occurs after the death of her husband. Co. Litt. 32 a, 32 b, n. 2; ante, p. 68.

IX. *Presentations to, and purchases of, Advowsons and next Presentations—when Legal, when Simoniacal.*

By simony is meant the corrupt presentation of any one to an ecclesiastical benefice for money, gift or reward, which, though not an offence criminally punishable at common law (*Barret v. Glubb*, 2 Black. Rep. 1052; *Bishop of St. David's v. Lucy*, 1 Ld. Raym. 449), has from an early period been condemned by many ecclesiastical canons; but inasmuch as the canon law, at any rate after the Reformation, was of no avail against the laity, the legislature attempted to repress the evil. Accordingly, by 31 Eliz. c. 6, it is enacted, "that if any person shall for any sum of money, reward, gift, profit or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant or other assurance of or for any sum of money, reward, gift, profit or benefit whatsoever, directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend or living ecclesiastical, or give or bestow the same" for such corrupt consideration, then such presentation, &c. shall be utterly void, and the crown may present for that turn. A penalty is then

imposed upon the parties, of "double the value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical," and the party seeking, &c. is disabled from enjoying the same; s. 5. The fraudulent admission, institution, installation, induction and investment, &c. of any person in or to any benefice with cure of souls, &c. is then declared void, and penalties imposed upon the parties, s. 6; as also for the corrupt resignation or exchange of a benefice with a cure of souls, s. 8; and ecclesiastical penalties are not taken away by the statute, s. 9.

The statute makes the presentation, admission, institution, and induction void in cases coming within the statute, where before its passing they were only voidable by deprivation. Co. Lit. 120 a.

The punishments thereunder are very properly severe, thus, where simoniacal presentation has been made, the patron will forfeit double the value of one year's profit of the benefice (s. 5); and all right to the revenues being taken away, any parties sued by the presentee, except where the relation of landlord and tenant has been established between them (*Cooke v. Loxley*, 5 T. R. 4; *Brooksbey v. Watts*, 6 Taunt. 333; 2 Marsh. 38), may plead, him no parson, because of the simony (Hob. 168), and the offence is not remitted by a general pardon. Sid. 170.

The presentation, moreover, will be void, and the crown may present for that turn (s. 5; *Greenwood v. The Bishop of London*, 5 Taunt. 727), and the clerk who had

been simoniacally promoted, can never be presented to the same living again. *Ante*, s. 5; *Booth v. Potter*, Cro. Jac. 533; 2 Roll. Rep. 465.

If the simoniacal contract were made without the privity of the presentee, the presentation will nevertheless be void, and devolve *pro hac vice* from the patron to the crown (*Booth v. Potter*, Cro. Jac. 533; *Baker v. Rogers*, Cro. Eliz. 788; *Hutchinson's Case*, 12 Rep. 74, 101; *Bawderok v. Mackaller*, Cro. Car. 330; *The King v. The Bishop of Norwich*, Cro. Jac. 385; 3 Lev. 337); in such case, however, the presentee is not within the clause of disability in the statute, he might therefore take the same benefice under a new presentation from the crown. *Doctor Hutchinson's Case*, 12 Rep. 101; 3 Inst. 154.

Where a person by usurpation presents by reason of a corrupt contract, the presentation, institution, and induction become thereupon void; but the rightful patron and not the king will then have a right to present, for otherwise every rightful patron might lose his presentation. Co. Lit. 120; *Winchcombe v. The Bishop of Winchester*, Hob. R. 167; *Walker v. Hammersly*, 3 Lev. 115.

A donative has been held to be within the meaning, although not within the express words of 31 Eliz. c. 6. Thus, where a person agreed to give another a sum of money if he should procure him to be presented by the king to the church in the Tower of London, being a donative of the king's donation, it was held that the

"transaction was simoniacal" because it was within an equal mischief, against which the statute provides, and so within the remedy thereof. *Bawderok v. Mackaller*, Cro. Car. 330.

The purchase of an *advowson in fee*, even if the incumbent to the knowledge of both the parties be in a dying state, is not simoniacal, if it be without the privity of the clerk afterwards presented, and with no view to his nomination. See *Barret v. Glubb*, 2 Black. 1082; *Greenwood v. Bishop of London*, 5 Taunt. 745; *Fox v. Bishop of Chester*, *ante*, p. 238.

If, however, the purchaser (*ante*, p. 252) received any promise or reward for the presentation it would clearly come within the terms of the act. So if some other person had received a reward for him, and was to account to him for it, or if the person presented, or some one in his behalf, was the real purchaser, this, as laid down in the principal case, would be a fraud on the act of 31 Eliz. c. 6, and would avoid the contract. *Ib.*

A stipulation by the purchaser of an *advowson* with the vendor who is not the incumbent, that the vendor shall pay interest to the purchaser at a certain rate until an avoidance occurs, is not void as being a corrupt bargain, or as being affected by the laws against simony, and it will, if otherwise unobjectionable, be enforced in equity. *Sweet v. Meredith*, 3 Giff. 610; 8 Jur., N. S. 637.

If the perpetual *advowson* be sold when the church is actually *void* by the death of an incumbent,

by his resignation or cession under 21 Hen. 8, c. 13, or by deprivation (*Leak v. The Bishop of Coventry*, Cro. Eliz. 811), the presentation upon that avoidance will not pass (*Bishop of Lincoln v. Wolferstan*, 1 Black. 490; 2 Wils. 174; 3 Burr. 1504; *Grey v. Hesketh*, Amb. 268), for "it is a personal right or interest, severed from the advowson and vested in the person of him who was patron at the time; a chose in action which is not assignable, and which is designated in the books by a great variety of names, all indicating its personal and inalienable quality." Per Tindal, C. J., in *Alston v. Atlay*, 7 Ad. & Ell. 305.

Upon institution of a clerk to a second living, the first is void *as to the patron*, but not so as to incur a lapse without sentence of deprivation and notice by the ordinary, or, at least until notice by the ordinary; and if void as to the patron, he cannot deal with the fallen right of presentation at all. It is a personal inalienable right. The want of notice of the cession makes no difference, because the right to the fallen presentation being a personal right disannexed from the advowson, it is clear that the want of knowledge of the vacancy by the patron cannot alter the quality of that right. It cannot make a personal thing real; it will not re-annex it to the advowson, any more than want of notice of rent being in arrear would enable the vendor of the reversion to transfer the rent in arrear with the reversion. *Alston v. Atlay*, 7 Ad. & Ell. 289, 311.

Advowsons belonging to corpo-

rate bodies may be sold under the direction of the Ecclesiastical Commissioners. 5 & 6 Will. 4, c. 76, s. 139; 6 & 7 Will. 4, c. 77, s. 26.

An exchange of livings by two clergymen, with the consent of their patrons, is legal (*Downes v. Craig*, 9 Mees. & W. 166). The mere fact, moreover, that there is an agreement between them that there should be no claim for dilapidations will not necessarily render the transaction simoniacal. *Goldham v. Edwards*, 16 C. B. 437; 17 C. B. 141; 18 C. B. 389.

And it has been recently held that such an arrangement is not so contrary to the policy of the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), as to have become illegal and void if made after the passing thereof. *Wright v. Davies*, 1 C. P. D. 638.

It may be here mentioned that advowsons in Ireland, taken from their owners by the Irish Church Act, 1869 (32 & 33 Vict. c. 42), not having been disposed of by them within the meaning of the Succession Duty Act, 1855 (16 & 17 Vict. c. 51), the amount of compensation received by them is not liable to succession duty. *Att.-Gen. v. Lord Leconfield*, 2 L. R., I. 290.

The sale of a next presentation during a *vacancy* is void as simoniacal. *Baker v. Rogers*, Cro. Eliz. 788; Moore, 914; *Johnstone v. Baber*, 6 De Gex, Mac. & G. 439.

If the church be full a sale will be valid, although the incumbent be in extremis (see the Principal Case, p. 252), unless the purchase be made with the intention of presenting a particular person; and if

upon a vacancy taking place such person is presented, the transaction will be considered corrupt and simoniacal, and consequently void (*Kitchin v. Calvert*, Lane, 102; *Winchombe v. Pulleston*, Noy, 25; Godb. 390), even, it seems, although the purchase may have been made by a father, with the intention of providing for his son. *Winchombe v. Pulleston*, Noy, 25, overruling *Smith v. Shelboun*, Cro. Eliz. 685.

And the legislature has disabled a person from purchasing the *next presentation* for himself; for by the statute 12 Anne, st. 2, c. 12, it is enacted, "that if any person shall for money, reward, gift, profit or advantage, or for or by reason of any promise, agreement, grant, bond or other assurance, of or for any money, reward, gift, profit or benefit, directly or indirectly, in *his own name*, or in the name of any other person or persons, take, procure or accept the *next avoidance of or presentation* to any benefice, and shall be presented or collated thereupon, that every such presentation or collation shall be utterly void and of no effect in law; and such agreement shall be deemed a simoniacal contract; and it shall be lawful for the crown to present or collate unto such benefice for that one time or turn only; and the person so corruptly taking, procuring or accepting such benefice, shall from thenceforth be adjudged a disabled person to have and enjoy the same, and shall be subject to any punishment, pain or penalty, prescribed or inflicted by the law ecclesiastical, in like manner as if

such corrupt agreement had been made after such benefice had become vacant." Sect. 2.

The purchase of "an estate" for life in an advowson, is not a purchase of a "next presentation" or "next avoidance" within the meaning of 12 Anne, st. 2, c. 12, s. 2, although there be only *one* avoidance during the life of the cestui que vie; if, therefore, the purchaser, being a clerk in holy orders, offers himself for admittance on a vacancy to the Church, the bishop cannot, if he be a fit person, refuse to admit and institute him. *Walsh v. The Bishop of Lincoln*, 10 L. R., C. P. 518.

So, if such purchaser had procured the advowson to be conveyed to a trustee, in trust to present a clerk on his nomination, and if the purchaser had nominated himself, the trustee would have been bound to present the plaintiff, and the bishop to institute him. Per Lord Celeridge, C. J., in *Walsh v. Bishop of Lincoln*, ib. 535.

So, if a patron to whom a living has descended as part of an ancestral property, and who is of himself a clerk of unquestionable fitness for the living, offers himself and prays to be admitted, it is not in the absolute discretion of the bishop, without expressing any reason, to reject him. Ib.

The decisions as to simony have been, some of them, of a very stringent character. Thus, it has been held that if a corrupt contract be made for money to present a person to a benefice, even if it be between strangers (*Bawderok v. Mackaller*, Cro. Car. 331; 1 Sid. 329; *Rex v. The Bishop of Norwich*,

3 Lev. 337), or with the wife of the patron, although he be not privy thereto, or presentation made in pursuance thereof will be void. *Roy v. L'Evesq. de Norwich*, 1 Roll. Rep. 233; *S. C. Cro. Jac.* 385.

Even if a person be presented gratis, after a contract to be presented for money, the presentation will be void as being within the statute; for a clerk who at one time intended to procure the benefice corruptly, cannot but be deemed an unfit person to hold it. *Kitchin v. Calvert*, Lane, 103.

A covenant by the father of a woman about to marry a clerk, in consideration of the marriage to procure him presentation to a certain church when void, will be simoniacal (*Byrt v. Manning*, Cro. Car. 425); secus if it be a distinct and independent covenant without any apparent consideration. *Ib.*

Where a father had given a bond to his son, for securing to him an annuity until he should be in possession of a living of a given value, and the son signed an agreement, declaring that he would take holy orders and accept such living as soon as it could be procured for him; Lord Eldon expressed great doubts whether such bond was not void, but the case was decided upon other grounds. *Kircudbright v. Kircudbright*, 8 Ves. 53.

An agreement by the clerk with the patron to pay an annuity to the widow of the last incumbent, or to his son as long as he should be at the university and unpreferred, has been held valid, though it is difficult to see upon what grounds. *Baker v. Mounford*, Noy. 142.

A bond, with a condition that the incumbent should not be absent eighty days in the year from his living, has been held not simoniacal as being a lawful condition. *Carey v. Yeo*, 7 Bac. Abr. 236.

A person will not be allowed to evade the statute by any underhand agreement. Thus, where a second brother, having a right to present, made a corrupt contract to present a certain person, but in order to evade the provisions of the statute surrendered the right of presenting to his elder brother, and the latter not being privy to the contract presented the person who pursuant thereto was to be presented, it was held that the corrupt contract was an offence within the statute, and that its being performed by an innocent person made no alteration in the case. *Calvert v. Kitchin*, Lane, 73. See also *Baker v. Rogers*, Cro. Eliz. 788; *Booth v. Potter*, Cro. Jac. 353.

X. Bonds of Resignation when valid.

Bonds of resignation given to the patron by a person about to be presented to a benefice, may be either *general* or *special*. By the former, the obligor binds himself in a penalty to resign the living on the request of the patron, generally; by the latter, in favour of some particular person or persons.

At one time the cases seem to have decided that *general* resignation bonds, upon the face of them good, were not to be avoided except by a plea showing them to have been originally made upon some corrupt contract not appearing therein, or

that an ill use was endeavoured to be made of them, by attempting to put them in force for improper purposes; in which latter case the remedy was an application to a Court of Equity for an injunction to restrain their being put in suit; 1 Bligh, N. S. 148; it was however held, in the House of Lords in the leading case of *The Bishop of London v. Ffytche* (2 Bro. P. C. 211, Toml. ed., best reported, Cunn. Sim. 52), that general resignation bonds were void.

Subsequently it was determined, that a special bond to resign in favour of one of two particular persons was invalid. See *Fletcher v. Lord Sondes*, 1 Bligh, N. S. 144, reversing the judgment of the Court of King's Bench and Exchequer Chamber, reported 5 B. & Ald. 835, and holding that the bond was simoniacal and void, upon the ground that such an agreement was a benefit to the patron, and contrary to the statute 31 Eliz. c. 6.

In consequence of many patrons and incumbents having acted under an erroneous impression of the law, and thus exposed themselves to severe penalties, 7 & 8 Geo. 4, c. 25 (the object of which is purely retrospective), was passed, giving validity to engagements made before 9 April, 1827, for resignation in favour of one of two persons specially named.

Afterwards, by 9 Geo. 4, c. 94, an engagement before presentation, nomination, collation or appointment, to resign a benefice in favour of one person or one of two per-

sons specially named and described therein, was made valid (s. 1), provided that where *two* persons are named, each shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew or grand-nephew of the patron, or of one of the patrons, not being merely a trustee or trustees of the patronage, or of the person or one of the persons for whom the patron or patrons shall be a trustee or trustees, or of the person or one of the persons by whose direction such presentation, &c. shall be intended to be made, or of any married woman whose husband in her right shall be the patron or one of the patrons, or of any other person in whose right such presentation, &c. shall be intended to be made (s. 2); presentations, &c. will be valid under such engagements (s. 3), if deposited within two months with the registrar of the diocese or peculiar jurisdiction where the benefice is (s. 4); and the resignation must state the engagement, and the name of the person for whose benefit it is made, and it will be void unless the person be presented within six months (s. 5). The act only extends to persons entitled to patronage as private property (s. 6).

It is to be regretted, that such an act should have been passed by the legislature, though we may not feel surprised, since so many of its members were interested in considering the presentation to advowsons to be a right to be exercised for their own private advantage, rather than a sacred trust to be exercised for

the good of the people. See the remarks of Hullock, B., and Garron, B., 1 Bligh, N. S. 190, 191.

glebe lands, see Cunningham & Mattinson's Precedents of Pleadings, 244.

XI. *On the several Remedies relative to Advowsons.*

When a patron was obstructed in presenting his clerk to a benefice, or disturbed in his right of presentation, the law gave him three writs; namely, the *writ of right of advowson*, which was a final and conclusive remedy, and the inferior possessory action, called an *assize of darrein presentment*, and a *writ of quare impedit*. The two former actions were abolished by 3 & 4 Will. 4, c. 27, s. 36.

The writ of quare impedit is abolished by 23 & 24 Vict. c. 126, s. 26, which enacts that, where any such writ would then lie, an action may be commenced by writ of summons issuing out of the Court of Common Pleas, upon which is to be endorsed a notice that the plaintiff intends to declare in quare impedit. And see 36 & 37 Vict. c. 60, sched. 2, 3; as to proceedings on the writ of quare impedit, see 3 Steph. Comm. 415, 7th ed.; *Tyrell v. Jenner*, 6 Bing. 283; *Stone v. The Bishop of Winchester*, 9 C. B. 62; 17 C. B. 633.

No ejectment will lie for wrongfully preventing the patron of a living from presenting to it on a vacancy. But possession may be recovered in ejectment by a clerk when he has been duly inducted. *Doe d. Watson v. Fletcher*, 8 B. & C. 25. As to claim by a clergyman to possession of rectory and

XII. *Limitation in Suits as to Advowsons.*

Until recent times there was no limitation with regard to the time within which any actions touching advowsons might be brought, for by stat. 1 Mar. st. 2, c. 5 (extended to Ireland by 10 Car. 1, st. 2, c. 6), the old Statute of Limitations (32 Hen. 8, c. 2) was declared not to extend to any writ of right of advowson, quare impedit, or assize of darrein presentment or jure patronatus. And by 7 Ann. c. 18, which was held not to be retrospective (*The Attorney-General v. The Bishop of Lichfield*, 5 Ves. 828), it was enacted that no usurpation upon any avoidance should displace the estate or interest of the person entitled to the advowson or the patronage thereof, who might present upon the next, or *any other avoidance* if disturbed, notwithstanding such usurpation. See Real Prop. Comm. 1st Rep. p. 53.

This unsatisfactory state of the law was altered by the Statute of Limitations, 3 & 4 Will. 4, c. 27, which in effect enacts that after the 31st December, 1833, no advowson is to be recovered, or right of presentation enforced, but within three successive adverse incumbencies, or sixty years (whichever be the longer period), reckoning therein incumbencies by lapse, but not incumbencies after promotions to bishoprics (sects. 30, 31); and a patron claiming in respect of an estate in

remainder on an estate tail, is for the purposes of the Statutory Law, to be considered as claiming through the person entitled to such estate tail (sect. 32). Successive adverse incumbencies extending over one hundred years form an absolute bar, unless the benefice has been since enjoyed under a rightful presentation; and in calculating this

period, a presentation adverse to the owner of a particular estate is considered adverse to the remainderman. Sect. 33.

The 33rd section applies to the case where a bishop claims as *patron*; but the act does not affect the right of any bishop to collate by reason of *lapse*. See 6 & 7 Vict. c. 54, s. 3.

WILLIAM CLUN'S CASE (*a*).

*Mich. Jac. 1, entered Termino Sanctæ Trin., Ann. 10 Jac. 1.
Rot. 664, in B. R.*

[REPORTED 10 Co. 126 a.]

RENTS—APPORTIONMENT.]—*Rent upon a lease for 50 years, if the lessor should so long live, was reserved payable at the four usual feasts, or within thirteen weeks after. After Lady-day, but within thirteen weeks, the lessor died. Her executor brought debt against the lessee for the rent due at Lady-day:—Held, upon demurrer, the action is not maintainable.*

The first reason of the resolution.—Because the disjunctive is added for the benefit of the lessee.

The second reason.—After non-payment of the rent on the first day, it is the same in law as if it had been reserved on the second day only.

When no election remains, it is the same in law as if none had ever existed.

Third reason.—The rent reserved is to be raised out of the profits of the land, and is not due until the profits are taken by the lessee; so that if the land is evicted, or the lease determined, before the time of payment, there shall be no apportionment of the rent.

There are four times of payment of rent issuing out of land:—1st. Voluntary and not satisfactory; 2nd. Voluntary and satisfactory to some purposes; 3rd. Satisfactory and not coercive; 4th. Satisfactory and coercive.

If rent be reserved on a lease for years made by tenant in fee, payable at a certain day or within a month after, and the lessor dies after the day but within the month, the heir shall have the rent as incident to the reversion; the law is the same upon a grant of the reversion between the two days.

(*a*) *Clun v. Archer*, S. C. Cro. Jac. 309; 4 Leon. 247.

If there be a lease for years, rendering rent at a certain day or one month after, with condition of re-entry, tender of the rent at the day saves the term. If the lessor dies between the two days, the heir shall have the rent.

WILLIAM CLUN, executor of Anne Breather, was plaintiff against Henry Archer, defendant, and demanded 9*l.* debt, and declared that the said Anne Breather, 26th Nov., anno 3 Jacobi Regis, by indenture of the same date demised to the said Henry one messuage, two mills, one garden, and divers lands in Coopersale, in Essex, from the feast of St. Michael the Archangel then last past, for fifty years, if the said Anne should so long live, reddendo et solvendo pro omnibus prædict. præmissis præfat' Annæ Breather, executor' et assignatis suis, annuatim et quolibet anno durante continuatione dimissionis prædict', ad domum mansionalem Johannis Archer in Witham præd', plenariam summam trigint' et sex librarum bonæ et legalis monetæ Angl' ad quatuor festa sive terminos in anno usualia, viz. festa nativitatis Dom' Jesu Christ', Annunciationis beatæ Mariæ Virginis, nativitat' Sancti Joh' Bapt' et Sancti Mich. Archangeli, *vel infra tresdecem septimanas proxim'* post quemlibet præd' dierum festival', per æquas et æquales portion'; by force of which the said Henry Archer entered into the said tenements, and had and held them usque ad et post fest' Annunciationis beatæ Mariæ Virginis, anno regni Regis nunc 9, sc. usque 2 *diem Aprilis anno 9 supradicto*, quo quidem 2 die Aprilis prædict' Anna apud Coopersale prædict' obiit; and for 9*l.* for the quarter due at the feast of the Annunciation anno 9 supradicto, he brought this action, upon which declaration the defendant demurred in law.

This case was often argued at bar, and now this term it was argued by the Justices Houghton, Dodderidge, Croke, and the Chief Justice; and it was resolved, that the action of debt was not (*a*) maintainable: and because duo sunt instrumenta ad omnes res confirmandas et impugnand', ratio et autoritas: first, I will report the reasons of this resolution, and then divers authorities in the point.

And three reasons of this resolution were shown. 1. Because the (*b*) disjunctive is added for the benefit of the lessee, and it is more for his benefit to have the last day, in which case there are two days

(*a*) 4 Leon. 247; Cro. Jac. 310.

(*b*) Cro. Jac. 310; 5 Co. 22 a; 1 Roll. 450; Cro. Eliz. 380; Cro. Jac. 500.

of payment, one voluntary, and that at the election and liberty of the lessee to pay it at the days of the said feasts; the other day of payment is at the end of the thirteen weeks after, and that is the (c) extreme and legal time; and therefore, forasmuch as the said Anne Breather died before the extreme and legal time, the lessee (d) is discharged of the rent by the act of God for the same quarter. Vide *Hill and Grange's Case*, Plo. Com. 172, 173, the most extreme time is the legal time.

And it is to be known, that in case of payment of rent issuing out of land there are four times of payment, the first time of payment voluntary and not satisfactory, and yet good to some special purposes. The second voluntary, and in case satisfactory, and in case not. The third legal and satisfactory, absolutely and not coercive. The fourth legal, satisfactory and coercive.

As to the first, if the lessee, donee or tenant pay his rent before the day, it is voluntary (e) and not satisfactory (f), for the cause rendered in the third reason: but if it be paid in the name of seisin of the rent, although it shall not (g) enure by way of satisfaction, yet it shall give a sufficient seisin to this purpose to have his assize or other remedy, for the law takes delight in giving remedy; and therewith agrees Lit. cap. Attornment, 127 b; vide (25) 45 E. 3, 44 b; 49 E. 3, 15; 15 E. 3; "Execution," 63; 37 H. 6, 33; 39 H. 6, 36; 5 E. 4, 2.

As to the second, if the rent is payable at the feast of Easter, if the tenant pays the rent in the morning and the lessor dies at two hours before noon of the same day: this payment was voluntary: and yet it is a good satisfaction against the heir (h), but not against the (i) king, 44 E. 3, 3 b.

As to the third, legal time is a convenient time before (j) the last instant of the day, which is the most extreme time, and is satisfactory

(c) Cro. Jac. 227, 233, 423, 500; 5 Co. 114 b; Co. Litt. 202 a.

(d) Cro. Eliz. 380; Cro. Jac. 228; 10 Co. 128 a.

(e) 1 Roll. Rep. 390.

(f) Therefore if there be a condition of re-entry in the lease for nonpayment of rent, rent paid before the day will not save the condition, if, on demand, it be not paid at the day. *Lord Cromwell v. Andrews*, Cro. Eliz. 15. But it seems that such a

payment would in equity be deemed satisfactory. See *Lord Rockingham v. Penrice*, 1 Swanst. 346, note to *Ex parte Smyth*.

(g) 4 Co. 10 a, and ref. Ib.

(h) *Lord Rockingham v. Penrice*, 1 Swanst. 346. Sed vide *S. C.* 1 P. Wms. 177; Salk. 578, reported differently.

(i) Brownl. 106; Hard. 24; Yelv. 167.

(j) Co. Litt. 202 a; Cro. Jac. 423, 500; 5 Co. 114 b.

and not coerce; for till the end of the day no remedy is given by the law, 21 H. 6, 40 a (*k*).

As to the fourth, that is when the rent is due and in arrear, and therefore it is well said by the poet (*l*),

*Judicis officium est ut res, ita tempora rerum
Quærere, quæsito tempore tutus eris.*

The second reason was, when the lessee doth not make (*m*) payment at the first day according to his election, then the rent is absolutely due at the second day, and the second day is as well parcel of the reservation as the first day, and therefore after the non-payment at the first, it is now upon the matter as much in law, as if it had been reserved (*n*) at the second day only, for when the whole election is past, as in 17 El. 344. If (*o*) a man by deed grants a rent-charge to one and his heirs, and doth not say, for him and his heirs, and dies, now the time of election to make it an annuity is past: and therefore if the grantee brings a writ of annuity against the heir (*p*), it shall not discharge the land, because when no election remains, it is as much in law, as if there never had been any election; and therefore upon the books in 43 E. 3, Bar. 194; 44 E. 3, 32; 15 E. 3, Execut. 63; 5 E. 2, 2. This case was put, if one, 1 Octob., makes a lease for years, or for life, or a gift in tail, yielding by the year a pair of gilt spurs at the feast of Easter, or twenty shillings at the feast of St. Michael the Archangel: in this case if the lessee doth not pay the spurs at the feast of Easter, nothing is due till the feast of St. Michael.

The third reason was, because the rent reserved is to be raised out of the profits of the land, and is not due until the profits are taken by the lessee: for these words (*q*) "reddendo inde, or reservando inde," is as much as to say, that the lessee shall pay so much of the issues and profits at such days to the lessor, for (*r*) reddere inde nihil aliud est quam acceptum restituere, seu reddere est quasi retro dare, and redditus dicitur a reddendo, quia retro it, sc. to the lessor, donor, &c.

(*k*) See *Tinckler v. Prentice*, 4 Taunt. 549; note to *Ex parte Smyth*, 1 Swanst. 343.

(*l*) 10 Co. 82 a; Co. Litt. 171 a; 3 Bulst. 170.

(*m*) Roll. Rep. 390.

(*n*) 4 Leon. 19; 1 And. 9.

(*o*) Dy. 344, pl. 2; Poph. 87; Co. Litt. 144 b; 1 Roll. 226; Hob. 58; Plowd. 457 a; Br. "Estate," 65; Br. "Annuity," 13;

Fitz. "Ann." 16; 2 H. 4, 13 a.

(*p*) "This seems a mistake; for if a man grants a rent in fee, without saying for him and his heirs, his heirs cannot be charged in an annuity." Vin. Abr. "Annuity, B. pl. 2."—Note in *Serjeant Hill's Copy*.

(*q*) Co. Litt. 141 b.

(*r*) Palm. 481.

sicut provent' a proveniendo ; and obventus ab obveniando.' And that is the reason that the rent so reserved is not due or payable before the day of payment incurred, because it is to be rendered and restored out of the issues and profits ; and that is the reason that if the land is (s) evicted, or if the lease determines before the legal time of payment, no rent shall be paid, for there *shall never be an apportionment in respect of part of the time, as there shall be upon an eviction of part of the land* (t) ; and therefore if tenant for life makes a lease for years, rendering rent at the feast of Easter, and the lessee occupies for three quarters of the year, and in the last quarter before the feast of Easter the tenant for life (u) dies, here shall be no apportionment of the rent for three quarters of the year, because no rent was due till the feast of Easter, and no apportionment shall be in respect of time ; but in the same case, if part of the land had been (v) evicted before the feast of Easter, and the feast of Easter incurred in the life of the lessor, there shall be an apportionment of the rent, but not in respect of the time which well continued, but in respect that parcel of the land leased is evicted (w).

And this difference appears in our books, 27 E. 3, 84 b. In (x) debt against executors, declaring that their testator granted him a pension of 20*l.* to remain with him in the king's wars at the time that he should be reasonably warned, to take at four times of the year equally ; and showing further, that he went with him to Calais by the warning of their testator, and was there armed ; and demanded judgment and prayed his debt. To which the defendant said, that for the first quarter he was paid 5*l.*, and showed forth an acquittance, and before the second quarter ended the testator died, and demanded judgment of the action. And Mowbray of counsel with the plaintiff moved, since you do not deny the pension to be granted as one entire by the year upon a condition which we have performed, sc. that we have remained with him, we prayed the debt : but Wilby, Chief Justice, by the rule of the court awarded that the plaintiff should take nothing by his writ, because there should be no apportionment in respect of part of the time, although it happened by the act of God. Vide 10 E. 4, 18 ; 20 H. 6, 6 ; 9 E. 4, 1 ; 30 H. 8 ; Br. Apportionm. 7.

(s) Co. Litt. 292 b ; Cro. Jac. 310 ; 3 Cro. 22 a ; Dyer, 56, pl. 15 ; Plowd. 134 b.

(t) Co. Litt. 148 b ; but see now 11 Geo. 2, c. 19, s. 15, and 4 & 5 Will. 4, c. 22.

(u) Cro. Jac. 228 ; Cro. Eliz. 380.

(v) Co. Litt. 148 b.

(w) See now 11 Geo. 2, c. 19, s. 15.

(x) Fitz. "Det." 140.

If I am bound to you by bond of 20*l.* to be paid at four usual feasts of the year by equal portions, the obligee shall not have an action of debt before all the terms incurred. The same law of a contract (*y*) : but if a rent is reserved on a lease for years, at four usual feasts of the year, the lessor shall have an action of debt after the first day, and shall not stay till the whole is due, because it is accounted in law as a reservation of parcel of the issues and profits of the land, which is no debt before the day, as in the said case of a bond or contract ; and that is the true difference betwixt the case of the bond and a rent reserved on a lease for years in Litt. 117 b ; vide F. N. B. 267 ; and note a difference betwixt a recognizance of a debt payable at several days, for that is not like a bond, but a rent reserved on a lease for years. Vide 3 Mar. (z) Dyer, 103. Another difference betwixt a covenant or promise and a contract or bond. Vide 5 Mar. *action sur le Case*, Br. 108, 10 E. 2, "Execut." 137, and 16 E. 2, *ibid.* 138 ; vide 9 E. 3, 7, for authorities in the point.

I have seen a report of a case, Mich. 34, H. 8, in the time of Baldwin, Chief Justice of the Common Pleas, that it was the opinion of all the justices, that if a man seised of land in fee, 1 *die Octob.*, makes a lease of the same land for ten years, from the feast of St. Michael then last past, yielding to him and his heirs the yearly rent of 20*l.* at the feast of St. Michael the Archangel, or within one month after ; that in this case, if the lessor dies between the feast of St. Michael and the end of the month, that the (*a*) heir shall have the rent as incident to the reversion, and not the executors as rent behind, because it was not due till the end of the month. The same law if the lessor betwixt the said two days had granted the reversion over, and the tenant attorned, the (*b*) grantee should have the rent as incident to the reversion.

And Mich. 2 & 3 P. & M., Prideaux, Serjeant, moved Montague, Chief Justice, and the other Justices of the Common Pleas, that if a man makes a lease for years, yielding a yearly rent at the feast of Easter, or one month after, with condition of re-entry, and the lessee (*c*) tendereth the rent at the last instant of the feast of Easter,

(*y*) *Walker's Case*, 2 Co. 59, 60.

(*z*) Dyer, 113, pl. 55 ; Cro. Car. 241 ; 4 Co. 94 b ; 2 Roll. Rep. 47 ; Cro. Jac. 505 ; Co. 153 a.

(*a*) Cro. Jac. 228, 310 ; Cro. Eliz. 565, 575 ; Orph. Leg. 159 ; 4 Leon. 247 ; Yelv.

167 ; 1 Brownl. 106 ; 3 Keb. 195.

(*b*) Cro. Jac. 228.

(*c*) Cro. Eliz. 14, 48, 73 ; Moor, 122, 223 ; Plowd. 70 b ; Co. Litt. 211 a ; 2 Leon. 130 ; Godb. 38.

if the lessor may enter upon demand made at the last instant of the month; and it seemed not, because the lessee had liberty to pay it then; and the difference was taken betwixt the said disjunctive reservation and when the reservation is at a certain feast; and a condition is added that if it be behind by the space of a month after the feast, that then the lessor shall re-enter; there the lessee, for the salvation of his lease, cannot tender it at the last instance of the feast day, because he has not such liberty and election as in the other case. And it was said by the new serjeants, that in the time of the Lord Baldwin, it was resolved by all the justices, that in the said case of the disjunctive reservation, if the lessor dies betwixt the two days, the heir shall have the rent, and not the executors, which case the Chief Justice showed in Court, reported by an ancient and learned benchman of the Inner Temple, Trin. 31 El., in the King's Bench, Rot. 666, betwixt Smith, plaintiff, and Bustard, defendant, where the case was in effect, that Smith leased certain lands for years, yielding yearly a rent of 35% at the feasts of St. Michael and the Annunciation of our Lady, or within twelve days after each of the said feasts, payable at the font stone in the Temple Church, upon condition that if the said rent of 35%, or any part of it, be behind and not paid, "per præd' spatium 12 dier' prox' post aliquod præd' festorum seu dierum solutionis inde prout supradict' est," that then the said lease should be void; and it was adjudged, that the lessee, in safeguard of his lease, should have twelve days (*d*) after the first twelve days to pay the said rent, for when the rent is not paid at the first day, it is as much as if it had been reserved upon the twelfth day after: and where it is said, "per præd' spatium 12 dierum post," &c., by good construction all the words ought to take effect, *sc.* post "aliquod præd' festor' seu dierum solutionis inde;" and dies solutionis is the twelfth day after the feast, and, therefore, the lessee shall have twelve days after the twelfth day, which is "dies solutionis post festum," &c., and that for the lessee's greater advantage, for whose benefit further time was given; and these words, "prædict' spatium 12 dierum," stand right in good sense, *sc.* per prædict' spatium 12 dierum post prædict' 12 dies, for that is prædict' spatium, although they have not the same beginning as the other have.

And so the *quære* in 3 & 4 P. & M. 142, was well resolved and

(*d*) Dy. 17, pl. 88, 97, pl. 104, 142, pl. 50; Plowd. 172 b; Dy. 142, pl. 50.

adjudged, Trin. 30 Eliz. in Communi Banco, inter (e) Pilkington and Dalton. The case was, a parson of a rectory made a lease for years, rendering rent at the feast of St. Michael, or within one month after; the lessor died ten days after the feast of St. Michael, and the plaintiff was barred by the judgment of the Court, because the lessor (f) died before the rent was due.

Paseh., 40 El., in the King's Bench, the case was, the Lady Elizabeth Pawlet, late the wife of Chedwick Lord Pawlet, seised of the manor of Wade, in the county of Southampton, for her life, by deed indented leased the said manor to William Pawlet for ninety-nine years, if the said Dame Elizabeth should so long live, yielding the yearly rent of 100*l.* at the feasts of St. Michael the Archangel and the Annunciation of our Lady, or within forty days after each of the said feasts. William Pawlet made Duleibel his wife executrix, and died; Duleibel took to husband John Moor, Esq. The Lady Elizabeth Pawlet made Ed. Walgrave her executor, and died the 13th day after the feast of St. Michael; her executor brought an action of debt for the half-year ended at the feast of St. Michael, before the death of the Lady Elizabeth, and tota curia contra querentem; but by entreaty of some of the justices, John Moor gave the plaintiff 10*l.*

And in the case at bar judgment was given, quod querens nihil capiat per billam (g).

Clun's Case is often cited as a leading authority for the common law upon the subject of rents, a species of incorporeal hereditaments of great importance, the rules regulating which ought to be, but certainly are not, simple and uncomplicated.

This is in consequence of the doctrines at common law having their origin in feudal times, and being, therefore, by no means, calculated to meet with the requirements of a different state of society. It is

true that the legislature by its interference has upon many occasions effected a partial good, but it has never attempted to regulate the subject as a *whole*, or to deal with it in a manner worthy of an enlightened system of jurisprudence.

In examining the subject of rents it is proposed to consider, I. What constitutes a rent and the different kinds thereof; II. How rents may be reserved or made payable; III. What estate may be had in a rent;

(e) Swinb. 323; 3 Keb. 47.

(f) Cro. Eliz. 380; Cro. Jac. 227, 233, 311; 1 Bulst. 1, 2; 1 Brownl. 105; 2

Brownl. 220; Yelv. 167.

(g) See *Barwicke v. Foster*, Yelv. 167.

IV. The payment of rents; V. The remedies for enforcing their payment; VI. Remedies against wrongful proceedings to obtain payment of rents; VII. The extinguishment of rents.

I. *What constitutes a Rent and its different kinds.*

A rent may be defined generally to be a fixed tribute, which issues out of land as part of its actual or possible profits (Burt. Comp. 1053). Rents are of three kinds: 1. Rent Service; 2. A Rent Charge; and 3. Rent Seck.

1. *What constitutes a Rent Service.*

A rent service has been defined "as an annual return made by the tenant, either in labour, money, or provisions, in retribution for the land that passes." Gilb. on Rents, 9.

A rent service is so called because, being connected with tenure, it is accompanied with some corporal service, as fealty at least, as where it is due from a tenant to the lord of a manor or other chief lord of the fee (Litt. s. 122; Co. Litt. 87 b; 7 Q. B. 978), or from a lessee to the reversioner; as if land be let by A. to B. for a term in consideration of his paying him a rent of 10*l.* in this case A. is the reversioner and the rent of 10*l.* is a rent service, and fealty is also due, though it be not now demanded. In all these cases the common law gives as incident to the reversion a right of distress, that is to say, of taking certain goods of the tenant upon nonpayment of the rent. Co. Litt. 142 a.

The right of distraining seems to have originated as follows: when the tenant did not perform the feudal service due to his lord, he might have been punished by the forfeiture of his estate. But these feudal forfeitures were afterwards turned into distresses, according to the pignory method of the civil law; that is to say, the land set out to the tenant was *hypothecated*, or as a pledge in his hands to answer the rent agreed to be paid to the landlord; and the whole profits arising from the land were liable to the lord's seizure for the payment and satisfaction of it (Gilbert on Rents, 4). Afterwards the severity of the law came to be mitigated to a seizure of everything found on the land, and the *distress* was substituted for the *seizure* of the feud, so that we may easily account for the fact that the power of distraining always attended the fealty, and was inseparably incident to the reversion; for as fealty could not have been demanded by a stranger from the tenant, nor consequently any forfeiture have been incurred by a refusal of it, so likewise a stranger could not distrain the goods of another person's tenant for nonpayment of rent. Thus if the lord granted to a stranger a rent which he had reserved from the tenant (which is in fact a rent seck), the stranger could not distrain for it, as he could not have taken advantage of a forfeiture of the land, for if he could have done so the land would have been liable to two different seizures at different times. Ib. 5, 6.

2. *What constitutes a Rent Charge.*

A rent charge is where by deed or will one person confers upon another a rent issuing out of lands either for a limited or absolute interest, together *with a power of distress* to recover such rent. Litt. s. 218.

Although a rent granted for equality of partition by one coparcener to another is not a rent service, because there is no tenure between the parties, inasmuch as it would be unreasonable that the coparcener who has parted with a share of the inheritance in lieu of the rent should not have a good security for its payment, the law, in order to encourage such partitions, has construed such rent a *rent charge of common right*, and has given a power of distress for the recovery of it. Litt. s. 251, 252; Gilb. on Rents, 19.

Upon the same principle where a rent is granted for equality of exchange, or to a widow in lieu of dower, it will be considered as a rent charge, having, as incident thereto of common right, a power of distress. Co. Litt. 169; Gilb. on Rents, 20.

The holders of rent-charges created by a railway company under sections 10 and 11 of the Lands Clauses Act, and charged on the undertaking of the railway company, have a first charge on the lands of the company comprised in the deeds of charge, and are entitled to have their rent-charges paid out of the net earnings of the undertaking in priority to debenture holders. *Eyton v. Denbigh, &c. Railway Company*, 7 L. R., Eq. 439.

3. *What constitutes a Rent Seck.*

A rent seck or *redditus siccus* is, first, where either a rent has been conferred by deed or will by one person upon another *without a power of distress*, in which case the grantee, not having the reversion or any right by reason of tenure, he could not at *common law* recover rent by distress (Litt. s. 218; *Buttery v. Robinson*, 3 Bing. 392; *Sollory v. Leaver*, 9 L. R., Eq. 22); or, secondly, where the rent was originally rent service, but subsequently was separated from the seignory or reversion. Burt. Comp. 1056.

There are rents called *rents of assize*, or certain rents at which freeholders or copyholders of a manor have held under the lord from time immemorial, and *chief rents*, similar rents paid by freeholders, both of which are sometimes called *quit rents*. 2 Inst. 19; 1 Steph. Comm. 650.

All these rents are now, as well as rents seck, made recoverable by distress; for by the 5th section of 4 Geo. 2, c. 28, it is enacted, "that all and every person or persons, bodies politic and corporate, shall and may have the like remedy by distress, and by impounding and selling the same in cases of rent seck, rents of assize, and chief rents, which have been duly answered or paid for the space of three years within the space of twenty years, before the first day of this session of parliament, or shall be hereafter created, as in case of rent reserved upon lease, any law or usage to the contrary notwithstanding."

Unless the case is brought within this section of the act, a rent seck

cannot be recovered by distress. *Bradbury v. Wright*, Doug. 627.

It is not however necessary that the three years there mentioned, during which the rents must have been paid in order to give the remedy by distress, should be consecutive. *Musgrave v. Emmerson*, 10 Q. B. 326; *Buttery v. Robinson*, 3 Bing. 392.

And inasmuch as a person having a rent seck has power to distrain under the statute of Geo. 2, and thus help himself, the Court of Chancery has refused to appoint a receiver where the rent was in arrear (*Sollory v. Leaver*, 9 L. R., Eq. 22); any more than it would do so under similar circumstances where the owner of a rent-charge had a power of distress under a deed. *Buxton v. Monkhouse*, G. Coop. Rep. 41. See also *Kelsey v. Kelsey*, 17 L. R., Eq. 495.

And in a proper case, although a receiver has been appointed, the Court has given leave to the owner of the rent-charge to distrain the goods and chattels on the land. *Eyton v. Denbigh, &c. Railway Company*, 6 L. R., Eq. 488; and see *Eyton v. Denbigh, &c. Railway Company*, 6 L. R., Eq. 14.

Railway rolling stock when on hire is protected from distraint. See 35 & 36 Vict. c. 50.

All rights to periodical payments, not issuing out of land, as they are merely personal, although they may be payable to a man and his heirs, are mere annuities. Co. Litt. 2 a; *Aubin v. Daly*, 4 B. & Ald. 59.

So where the property in land and its management are vested in a

corporation, as, for instance, an hospital, which is to receive the rents, and amongst other purposes pay the residue among certain inmates, such inmates will not be entitled to a rent-charge, but to a mere money payment; they would not therefore be able to distrain for non-payment. *Steele v. Bosworth*, 18 C. B., N. S. 22; 34 L. J., C. P. 57; *Simey v. Marshall*, 8 L. R., C. P. 269.

Formerly, when a rent-charge or annuity, for any life or lives, or for any term of years or greater estate determinable on any life or lives, was granted for a pecuniary consideration or money's worth (unless secured on lands of equal or greater value than the annuity, and of which the grantor was seised in fee simple or fee tail in possession), it was requisite that a memorial thereof within thirty days after the execution of the deed should be inrolled in the Court of Chancery, otherwise the same would be void (53 Geo. 3, c. 141; 3 Geo. 4, c. 92; 7 Geo. 4, c. 75). Such memorial was rendered unnecessary by 17 & 18 Vict. c. 90, repealing the last-mentioned statutes.

By a recent statute however annuities or rent-charges, granted after the 26th April, 1855, otherwise than by marriage settlement or will, for a life or lives, or for any term or greater estate determinable on a life or lives, shall not affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, until the particulars mentioned in the act are registered in the Court of Common Pleas. 18 & 19 Vict. c. 15, ss. 12—14.

II. *How a Rent may be reserved or made payable.*

1. *What may be a Rent.*

Although rent is usually reserved or made payable in money, it is not necessarily so, for it may be reserved, according to Coke, "as well in the delivery of hens, capons, roses, spurs, bows, shafts, horses, hawks, wheat, or other profit that lieth in render, office, attendance and such like." Co. Litt. 142 a. So, it has been determined, that holding lands by the service of keeping up a grindstone for the convenience of a parish (*Doe v. Robinson v. Hinde*, 2 M. & Rob. 441; and see 7 Q. B. 978; sed vide Sug. Real Prop. Stat. 60, 2nd ed.), of cleansing the parish church (*Doe d. Edney v. Benham*, 7 Q. B. 976, 981), or of ringing the church bells at stated hours (*Doe d. Edney v. Billet*, 7 Q. B. 976, 983), without any pecuniary render, is a rent service for the nonperformance of which a distress might be made.

Rent must be either certain, or what can be reduced to a certainty. Co. Litt. 96 a. Thus a man might hold of his lord to shear all the sheep depasturing within his manor, and this reservation is certain enough, because although the number might vary, yet it might be ascertained by reference to the manor, and the lord might distrain in case the tenant did not render the services reserved. (Ib.) And there may be a reservation of a corn rent or an annual sum in lieu thereof (*Blewett v. Jenkins*, 12 C.B. (N. S.) 16). And it has been held in the case of customary tenants,

that in the absence of a custom to the contrary, the election is with the tenant, to pay either in money or corn (Ib.); but it seems that if the tenant made default in payment on the day, the election might be with the lord, and he might bring his action either for the corn rent or the money. Ib. p. 31.

A rent cannot consist of part of the annual profits of the land, as of the vesture or herbage thereof (Ib. 142 a), for this would be an *exception* of part of the thing granted, and not a reservation (Co. Litt. 47 a; see also *Wickham v. Hawker*, 7 Mees. & W. 63; *Doe d. Douglas v. Lock*, 2 Ad. & E. 705; *The Durham and Sunderland Railway Company v. Walker*, 2 Q. B. 940; *Pannell v. Mill*, 3 C. B. 625); though it seems in the case of mines it may consist of a portion of the ore, which is part of the land itself. *Campbell v. Leach*, Amb. 740; *Buckley v. Kenyon*, 10 East, 139; *Rex v. Earl of Pomfret*, 5 M. & S. 139; sed vide *Rex v. Inhabitants of St. Austell*, 5 B. & Ald. 693; *Daly v. Beckett*, 24 Beav. 114.

So where a person held land for which he paid 2*l.* per acre, without reference to the use made of the land, and a royalty of 1*s.* 6*d.* for every thousand bricks moulded in one year, it was held by the Court of Queen's Bench, that the royalty, together with the annual fixed charge, was properly considered as the rent. *The Queen v. Westbrook*, 10 Q. B. 178, 203.

2. *Out of what Rent may issue.*

As a general rule, a rent can only

issue out of a corporeal hereditament, inasmuch as, although capable of being demised, no resort by way of distress can, from their nature, be had to incorporeal hereditaments. Thus a rent will not issue out of a right of common or an advowson in gross. *Gilb. on Rents*, 20—23; *Co. Litt.* 47 a, 142 a; 3 *Cruise, Dig.* 275.

Although a sum made payable out of incorporeal hereditaments cannot be sued for as a rent, it may be recovered in an action of debt, as a sum due on a contract. *Jewel's Case*, 5 *Co.* 3; *Co. Litt.* 47 a.

There are, however, some exceptions to the rule. Thus a rent may be good if reserved out of a reversion or remainder, for, although they are incorporeal hereditaments, they will become corporeal, and a distress may be taken on the determination of the particular estate (*Co. Litt.* 47 a). Upon the same principle, if the lord grants his seignory, reserving rent, the reservation is good, because there is a prospect, though distant, of a remedy by distress upon the escheat of the tenancy. 2 *Roll. Abr.* 446.

So, by statute, rents may be reserved out of incorporeal hereditaments, as in the case of leases of tithes under 5 *Geo.* 3, c. 17; and a lessee of tithes is liable on his covenant to pay rent, notwithstanding the tithes have been commuted for a rent-charge, his remedy being by surrender of his lease, under the 88th section of the Tithe Commutation Act (6 & 7 *Will.* 4, c. 71). *Tasker v. Bullman*, 3 *Exch.* 351.

The crown, moreover, may reserve rent out of an incorporeal inheritance, because by its prerogative it may distrain on all the lands of its lessee for such rent; and having such remedy for the rent, there is no reason that the reservation should not be good. *Co. Litt.* 47, n., 284; 7 *Bac. Abr.* 10, 7th ed.

A rent may be reserved out of the vesture or herbage of land, because the lessor may go upon the land to distrain the lessee's beasts feeding thereon. *Co. Litt.* 47 a; 2 *Roll. Abr.* 446; *Gilb. on Rents*, 26.

If a rent is reserved out of two things, as for instance, a messuage and furniture, and one of those things, *i.e.* the furniture, is of such a kind as that rent will not issue therefrom, it will in point of remedy be held to issue wholly out of the other thing, *i.e.* the messuage. See *Farewell v. Dickenson*, 6 *B. & C.* 251; *Vin. Abr.* "Reservation," O; *Dobitofte v. Curteen*, *Cro. Jac.* 452; *Emmot v. Cole*, *Cro. Eliz.* 255.

3. *To whom Rents may be reserved.*

As a general rule a rent can only be reserved to the lessor or his heirs, and not to a stranger. Hence it is said by Littleton, "That no rent (which is properly called a rent) can be reserved upon any feoffment, gift or lease, to any person, but to the feoffor, donor, or lessor, or their heirs, and in no manner to a stranger." *Litt. s.* 346. In *Oates v. Frith*, *Hob.* 130, where a father seised in fee, and his son joined in a lease, to commence after the death of the father, rendering rent to the son, upon the father's death the

reservation of rent was held void, even although in the event the son turned out to be heir of the lessor; but if the reservation had been to the lessor and his heirs it would have been good, for though the father would never have had it in his power to demand the rent, the son would have taken it not as purchaser, but as incident to the reversion which he took from his father by descent. Co. Litt. 213 b, n. 1; Ld. Nott. MSS. [note 115]. See also *Doe d. Barber v. Lawrence*, 4 Taunt. 23; *Chetham v. Williamson*, 4 East, 469; *Moore v. The Earl of Plymouth*, 3 B. & Ald. 66.

Rent may be reserved to one of two joint tenants upon the demise of his share to the other, with the usual incidents of a reversion and right to distrain. *Cowper v. Fletcher*, 6 Best & Sm. 464.

III. *Estate which may be had in a Rent and its Incidents.*

A *rent-charge* may be limited to a person and his heirs which gives him an estate in fee simple in it. 3 Cruise, Dig. 289.

So a person may be *tenant* in fee of a *rent-service* created before the statute *Quia Emptores* (18 Ed. 1, c. 1); but since that statute a *rent-service* in fee, which is sometimes termed a *fee farm-rent*, cannot be reserved, upon a conveyance from one subject to another in fee, because by the operation of the statute *Quia Emptores* upon a grant of land in fee simple, the grantee holds not of the grantor, but of the person of whom the grantor held, the grantor having no reversion left in him, there is no tenure between him and

the grantee: and, consequently, as a *rent-service* is only incidental to tenure, there is no *rent-service* (Co. Litt. 144 a, n. 5); it would, however, be considered as a *rent-charge* for which, under an express power in the grant, a distress might be taken (Ib.), and in the absence of such power it would be considered as a *rent-seck*, and as such, if brought within the 5th section of 4 Geo. 2, c. 28, by payment for three years, it might be distrained for. *Bradbury v. Wright*, 2 Dougl. 624.

These *rent-charges* in fee simple are not uncommon, especially in the towns of Liverpool and Manchester, where it is the usual practice to dispose of an estate in fee simple in lands for building purposes, in consideration of a *rent-charge* in fee simple by way of ground rent, to be granted out of the premises to the original owner.

So there may be an estate tail (Cruise, Dig. 289), an estate for life or *pur autre vie*, or for years in a rent (Ib.). As to occupancy of a rent, see ante, pp. 51, 52, 53.

A rent in fee or in tail will be subject to the usual incidents to real property, viz. curtesy (Co. Litt. 29 a) and dower (Ib. 32 a), and see ante, p. 68, and *Chaplin v. Chaplin*, 3 P. Wms. 229.

A *rent-charge* may be granted in remainder after a limitation to a person for life (*Salter v. Butler*, Yelv. 9), and if granted *de novo*, may, even at common law, commence *in futuro* (Cruise, Dig. 293). A rent, however, *in esse* or already created cannot at common law be granted to commence *in futuro*. Ib.; Gilbert on Rents, 60.

As to rents under the Statute of Uses, see post, note to *Tyrrell's Case*.

IV. *The Payment of Rents.*

With regard to the payment of rents, these considerations naturally arise:—1. Where rent is payable; 2. At what time it becomes due; 3. Its amount, and what deductions may be made therefrom; 4. The mode of its payment; 5. To whom rents are payable, and herein of apportionment.

1. *Where Rent is payable.*

Where a particular place is by contract fixed upon for the payment of the rent, it must of course be paid there. In the absence of contract, the proper place for making the payment is on the demised premises. *Boroughes's Case*, 4 Co. 72 a; *S. C.* nom. *Burrough v. Taylor*, Mo. 404; Co. Litt. 201 b, 202 a.

2. *At what Time Rent becomes due.*

Rent does not, strictly speaking, become due until *midnight* of the day mentioned for its payment. *Cutting v. Derby*, 2 Bl. 1077; *Lefiley v. Mills*, 4 T. R. 173; *Norris v. Harrison*, 2 Madd. 268.

Where, however, the landlord desires to take advantage of a condition of re-entry for nonpayment, or the tenant desires to avoid a forfeiture, the proper time for the demand by the former, and tender by the latter, is *sunset* of the day of payment. *Flowd.* 172; *Duppa v. Mayo*, 1 Wms. Saund. 287; *Tinkler v. Prentice*, 4 Taunt. 549; *Haldane v. Johnson*, 8 Exch. 694; *Doe d. Wheeldon v. Paul*, 3 C. & P. 613;

Acocks v. Phillips, 5 H. & N. 183; *Tulton v. Darke*, 5 H. & N. 647.

But by 15 & 16 Vict. c. 76, s. 210, re-enacting 4 Geo. 2, c. 28, s. 2, no formal demand or re-entry is necessary before ejectionment, provided half a year's rent be due, and no sufficient distress is found on the premises.

It is of much importance for both parties to remember at what time rent becomes due, not only in order that the person demanding it may not by mistake take proceedings prematurely to obtain payment thereof, but also because ignorance of the law on the part of the person who ought to pay it may lead in some cases to a forfeiture of the premises, in others to a payment of the rent to a person not entitled thereto. For instance, if the lessor being seised in fee, died intestate on the rent day between sunset and midnight, as the rent would not be due until the latter period (the Apportionment Acts, previous to the Apportionment Act, 1870 (33 & 34 Vict. c. 35) (see post, 306) not applying to such a case), the *whole* of the rent due since the last rent day would be payable to the heir-at-law, as incident to the reversion which descends to him, and not to the personal representatives of the lessor. *Duppa v. Mayo*, 1 Wms. Saund. 287.

Lord Coke in the principal case has classified what he terms "the times of payment" of rents, he might more accurately have spoken of the result of the payment of rent at different times.

1. If the rent be paid *before* the day, although the receipt thereof be

sufficient to give the landlord seisin if paid for that purpose, yet it is both voluntary and not satisfactory. And it has been held, where rent has been paid *before* the day, although the lessor lived until the day, but died before midnight, that although it was a good payment as to the tenant, yet that the executor of the lessor ought to make the same good to the person entitled to the reversion. *Lord Rockingham v. Penrice*, 1 Swanst. 345, n.

2. If the tenant paid the rent on the morning of the day on which it became due, and the landlord died two hours before noon, although the payment was voluntary, it would be satisfactory as against the heir, to whom the lands descend (*Dibble v. Bowater*, 2 E. & B. 564), though not as against the crown. 44 E. 3, 3 b.

3. A payment of rent made at the last instant of the day mentioned for payment of the rent, although voluntary, is satisfactory against all persons.

4. After that time the payment of rent is not only satisfactory, but also coercive or liable to be compelled by coercion.

3. *The amount of Rent, and what Deductions may be made from it.*

The tenant must of course pay the full amount of rent due, unless there are any deductions which he can legally make therefrom. He may, for instance, deduct such taxes and rates which he has, in obedience to the legislature, paid in the first instance, and which are afterwards to be deducted from the rent payable to the lessor, as, for instance, the *land-tax* (38 Geo. 3, c.

5, s. 17; *Stubbs v. Parsons*, 3 Barn. & Ald. 516), *tithe rent-charge* (6 & 7 Will. 4, c. 71, s. 80), and *income-tax* (5 & 6 Vict. c. 35, Schedule A, No. 4, Rule 9; see also *Franklin v. Carter*, 1 C. B. 750), *sewers rates* (*Smith v. Humble*, 15 C. B. 321), unless he has entered into a contract with the lessor, whereby (except in the case of the income tax, which the legislature has forbidden him to do, 5 & 6 Vict. c. 35, s. 73) he takes those payments upon himself.

It has, however, been recently decided at law, that there is no illegality in a covenant for an increase of rent during the period for which the premises should be charged with an income or property tax, and that the landlord is entitled to be paid the larger rent stipulated for. *Colbron v. Travers*, 12 C. B., N. S. 181. See also *Beadel v. Pitt*, 13 W. R. (V. C. S.) 287; *Davies v. Fitton*, 2 Dru. & War. 225.)

A tenant ought to deduct the property tax in his next payment of rent, for if he omit to do so, he cannot afterwards recover the amount as *money paid* to the use of his landlord. *Cumming v. Bedborough*, 15 Mee. & W. 438.

Many other rates, such as poor-rates, highway rates, county and borough rates fall upon the occupier.

If the tenant in possession be an underlessee, he may, in order to protect himself from distress on the part of the superior landlord, pay any arrears of rent due from his own lessor, and deduct the sum so paid from his own rent. *Sapsford v. Fletcher*, 4 T. R. 511; *Exall v. Partridge*, 8 T. R. 308; *Taylor v.*

Zamira, 6 Taunt. 524; *Johnson v. Jones*, 9 Ad. & Ell. 809; *Wheeler v. Branscombe*, 5 Q. B. 373.

The principle upon which the decisions proceed is, that as the landlord, either expressly or by implication, undertakes to protect the tenant in the undisturbed enjoyment of the property demised, he by implication authorizes him to apply his rent due or accruing due for that purpose (*Graham v. Allsopp*, 3 Exch. 186; *Jones v. Morris*, Ib. 742; *Boodle v. Campbell*, 7 Mann. & Gr. 386); and the underlessee may make the payment, upon the superior landlord demanding it, although he may not have threatened to distrain his goods. See *Carter v. Carter*, 5 Bing. 406; *Valpy v. Manley*, 1 C. B. 594.

However, a tenant of a mortgagor in possession cannot, in an action brought against him by his landlord for use and occupation, plead a notice from the mortgagee who was entitled to the land during the whole period of occupation, claiming the mesne profits, although he might plead an actual payment upon a demand by the mortgagee. *Wilton v. Dunn*, 17 Q. B. 294.

As to the respective rights of mortgagors and mortgagees to rents, see *Moss v. Gallimore*, 2 Sm. L. C. 629, 7th ed.

4. *The Mode of Payment of Rent.*

Like any other payment as between debtor or creditor, rent may be paid either to the landlord himself or to any duly authorized agent (*Owen v. Barrow*, 1 Bos. & Pul. N. R. 101; *Goodland v. Blewith*, 1 Camp. 477; *Wilkinson v. Candlish*, 5 Exch. 91) by a remittance by

post, if authority be given by the landlord, either expressly or by implication, as where the tenant has been accustomed so to remit it (*Warwick v. Noakes*, Peake, 98). As to payment by giving cheques, see *Pearce v. Davis*, 1 M. & Rob. 365; *Hough v. May*, 4 Ad. & Ell. 954.

And although a security, as a bond (1 Roll. Abr. "Debt," "Extinguishment" (A), pl. 2, p. 605), even on account of a judgment debt (*Baker v. Walker*, 14 Mees. & W. 465), or a promissory note or bill of exchange payable at a future day (*Davis v. Gyde*, 2 Ad. & Ell. 623), be given for payment of rent, as the rent ranks as high as a specialty debt (*Willett v. Earle*, 1 Vern. 490; *Gage v. Acton*, Carth. 511; *Thompson v. Thompson*, 9 Price, 471), it will not merge in the security as if it had been a mere simple contract debt, and consequently the landlord's remedy by distress is not suspended by his having taken the security. See 1 Roll. Abr. "Debt," "Extinguishment" (A), pl. 2, p. 605; *Skerry v. Preston*, 2 Chit. 245; *Davis v. Gyde*, 2 Ad. & Ell. 623; *Parrott v. Anderson*, 7 Exch. 93.

5. *To whom Rents are payable, and herein of Apportionment.*

If rent be reserved generally, without saying to whom, the law will give it as incident to the reversion upon the lessor's death intestate, if he be seised in fee, to his heir at law, and, if he have merely a chattel interest, to his executor or administrator. 21 H. 7, 25, pl. 2; *Whitlock's Case*, 8 Co. 71; Gouldsb. 148, pl. 68; *Sacheverel v. Frogate*, 1 Vent. 161; *Bland v. Inman*, Sir W. Jones, 308, 309.

Where a person dies leaving a presumptive heir, and his wife afterwards gives birth to a son—the absolute heir, if the presumptive heir before the birth of the posthumous son enters and receives the rents, an action of account will not lie against him, and he will be entitled to retain what he has received and lawfully acquired; but he will not be entitled to any intermediate rents not received before the birth of the heir. *Goodale v. Gawthorne*, 2 Sm. & Giff. 375. See also *Goodtitle v. Newman*, 3 Wils. 526; *Basset v. Basset*, 3 Atk. 202; *Bullock v. Stones*, 2 Ves. 521; *Doe v. Clarke*, 2 H. Black. 399.

If the lessor has by deed or will conveyed or devised the reversion upon his death, in the first case his grantee, in the second his devisee, will be entitled to the rents. If the lessor were only tenant for life or years, the rents would then be payable to the remainderman.

As to the effect of particular forms of reservations of rent, see 2 Platt, Leases, 88.

6. *Apportionment of Rent in respect of Time.*

At common law, as is laid down in the principal case, there is no *apportionment of rent in respect of time*, rent not being held to accrue due like interest *de die in diem*, but only to become payable in the event of the accomplishment of the full period upon the expiration of which it is made payable. Thus if the lessor seised in fee, or having a limited interest with a power of leasing, died in the interval between two days of payment, his personal representatives at common law

(before it was altered by the statutes hereinafter referred to), could not claim the rent up to the time of his death, but it would go as incident to the reversion either to the heir at law, devisee or remainderman, as the case might be. *Earl of Strafford v. Lady Wentworth*, Prec. Ch. 555; 1 P. Wms. 180; *Lord Rockingham v. Penrice*, 1 P. Wms. 177; Salk. 578; *Norris v. Harrison*, 2 Madd. 268.

The inconvenience of this rule of common law was shown most strikingly in the case (remedied by the Apportionment Act, 11 Geo. 2, c. 19, s. 15), where a person having a limited interest in land as a tenant for life without a power, granted a lease, reserving rent payable half-yearly, and died in the interval between the rent days, the lessee was only bound to pay the rent up to the last rent day, and was not bound to pay any from that time up to the determination of the lease by the death of the tenant for life (*Barwicke v. Foster*, Cro. Jac. 227, 228; *Jenner v. Morgan*, 1 P. Wms. 392; *Hay v. Palmer*, 2 P. Wms. 502); for the executors of the tenant for life could not bring an action for use and occupation, nor could the remainderman claim the rent, for he was only entitled to what became due during his time. Amb. App. 809, Blunt's Ed.

To prevent the injustice occasioned by this state of the common law as to rents, 11 Geo. 2, c. 19, s. 15, was passed, by which, after reciting as follows, "whereas when any lessor or landlord having only an estate for life in the lands, tenements or hereditaments demised happens to die before or on the day

on which any rent is reserved or made payable, such rent or any part thereof is not by law recoverable by the executors or administrators of such lessor or landlord, nor is the person in reversion entitled thereto, any other than for the use and occupation of such lands, tenements, or hereditaments, from the death of the tenant for life, of which advantage hath been often taken by the undertenants, who thereby avoid paying anything for the same," &c., it is enacted, that "where *any tenant for life* shall happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements or hereditaments, *which determined on the death of such tenant for life*, the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such undertenant or undertenants of such lands, tenements or hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived of the last year or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof, respectively.

Although the statute (11 Geo. 2, c. 19) only enacts that the rent shall be apportionable on the death of a *tenant for life*, it has been held, that it extends to the case of a lease made by a *tenant in tail not binding upon the remainderman*, and that consequently the personal repre-

sentatives of the tenant in tail could recover the rent due up to the time of his death (*Whitfield v. Pindar*, cited 2 Bro. C. C. 662; 8 Ves. 311). Whether the Judges in coming to such a decision did not assume a legislative power may be well doubted.

There is, however, another class of cases where money having been paid by the tenant to the remainderman for a whole half-year's rent, or part thereof, being on account of an interval during the life of a tenant in tail, who had made a lease *not binding on the remainderman*, where it was decided that the representatives of the tenant in tail were entitled to an apportionment, not so much as coming within the words of the act, but upon the principle that a person who, being under no obligation, makes from conscientious motives a payment to another, such payment must be taken to be for the use of the person under whom the enjoyment of the lease was had. See *Paget v. Gee*, Amb. 198, 807, Blunt's Ed.; *Vernon v. Vernon*, 2 Bro. C. C. 659; *Hawkins v. Kelly*, 8 Ves. 311; *Aynsley v. Wordsworth*, 2 V. & B. 331; *Oldham v. Hubbard*, 2 Y. & C. C. C. 209; *Lord Londesborough v. Somerville*, 19 Beav. 295.

Where a tenant for life with power of leasing granted leases, some in writing, and some by parol not in conformity with the power, it was held, that as the interest of the lessee determined with the life of the lessor the rent was apportionable (*Ex parte Smyth*, 1 Swanst. 337; *Clarkson v. Scarborough*, 1 Swanst. 354; *Symons v. Symons*, 6 Madd. 207); as it was also on the

death of a tenant for a term of years determinable on lives. *Paget v. Gee*, Amb. 810.

It was however doubtful whether a tenant *pur autre vie* or his executors were within the statute. *Wykham v. Wykham*, 3 Taunt. 331.

Where however the tenancy was created by a prior owner in fee, and was not determined by the death of a tenant for life, there was no apportionment under the statute. Thus where A. being tenant in fee died in January, 1833, during the currency of several Lady-day and May-day tenancies from year to year, without having given notices to quit in due time, and devised to B. for life, who died in August, 1833, after the expiration of those years of the tenancies, which were current at the death of the testator, and within the first half-year of the fresh tenancies, it was held by the Court of Exchequer, that the administrator of B., the devisee for life, could not recover that portion of the rent which became due between January, 1833, and August, 1833, under 11 Geo. 2, c. 19, s. 15, for both the tenancies running during that time were created not by her but by the tenant in fee, and did not therefore determine with her life. *Botheroyd v. Wooley*, 5 Tyrw. 522.

So, if a tenant for life *with power of leasing*, granted a lease reserving rent quarterly, died between the quarter days, his executors had no right to a proportionate payment of the last quarter's rent, as it went to the remainderman; and where the tenant for life in such a case died on a quarter day, but before midnight, when the rent became due,

his executors were held not to be entitled to the quarter's rent. *Norris v. Harrison*, 2 Madd. 268.

The statute of 11 Geo. 2, c. 19, was held not to be applicable to land tax and quit rents, and they were held not to be apportionable in equity. See *Sutton v. Chaplain*, 10 Ves. 66.

In this state of the law, 4 & 5 Will. 4, c. 22 (which received the royal assent on the 10th June, 1834) was passed, whereby (after reciting 11 Geo. 2, c. 19, s. 15) it was enacted, that rents reserved and made payable on any demise or lease of lands, tenements, or hereditaments, *which have been and shall be made*, and which leases or demises *determined or shall determine* on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life or lives for which such person was entitled to such hereditaments, shall, so far as respects the rents reserved by such leases, and the recovery of a proportion thereof by the person granting the same, his or her executors or administrators (as the case may be), be considered as within the provisions of the said recited act. Sect. 1.

That from and after the passing of this act all rent service reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power (*and which leases shall have been granted after the passing of this act*), and all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions and all other payments of every description in the united kingdom of Great Britain

and Ireland, made payable or coming due at fixed period under any instrument that shall be executed after the passing of this act, or (being a will or testamentary instrument) that shall come into operation after the passing of this act, shall be apportioned so and in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions or other payments as aforesaid, or in the estate, fund, office or benefice, from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions and other payments being made; and that every such person, his or her executors, administrators and assigns, shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions and other payments when the entire portion of which such apportioned parts shall form part shall become due and payable, and not

before, as he, she or they would have had for recovering and obtaining such entire rents, annuities, pensions, dividends, moduses, compositions and other payments, if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements and hereditaments comprised therein shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons who if this act had not passed would have been entitled to such entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this act in any action or suit at law or in equity. Sect. 2.

The provisions herein contained shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable on policies of assurance of any description (sect. 3). See as to the construction of sect. 3, *Tyrrell v. Clark*, 2 Drew. 86.

The object of this act, it will be observed, is twofold; *first*, to extend the remedies of 11 Geo. 2, c. 19, to the representatives of lessors not strictly tenants for life, and to lessors whose interests determined by the death of the cestui que vies. *Secondly*, to apportion "rents, annuities and other payments not apportionable, unless express provision be made for the purpose." Hayes's Introd. 291. The act, it will be observed, extends to Scotland. *For-dyce v. Bridges*, 1 H. L. Ca. 1.

The provisions of this statute are

extended by stat. 6 & 7 Will. 4, c. 71 (Tithes Commutation Act), s. 86, to rent-charges payable under that act; and by 4 & 5 Vict. c. 35 (the Copyhold Enfranchisement Act), s. 50, to rent-charges under that act.

The act of 4 & 5 Will. 4, c. 22, is unfortunately not well drawn, and its construction has given rise to many doubts and difficulties, which the decisions of the Courts have by no means cleared away.

In a recent case in Ireland it has been held that a jointure rent-charge terminating with the life of the jointress is apportionable under 4 & 5 Will. 4, c. 22. *Sutton v. Ennis*, 4 I. R., Eq. 325.

With regard to the apportionment of rents, it has been held that the second section of the act extends to two classes of cases. First, under the earlier words of the section, whenever a lease is made *after the act*, whether by a tenant in fee or for life or under a power, there will be an apportionment, even though the life interest in respect of which the apportionment was to take place should have been created by an instrument executed before the act (*Lock v. De Burgh*, 4 De G. & Sm. 470; *Plummer v. Whiteley*, Johns. 585; *In re Alexander*, 4 Ir. Ch. Rep. 265; *Fletcher v. Moore*, 3 Jur., N. S. 458); and it is immaterial that the lease is created under a power contained in an instrument executed *before* the act (*Lock v. De Burgh*, 4 De G. & Sm. 470; *Plummer v. Whiteley*, Johns. 585). Secondly, under the remaining words, there will also be an apportionment of all rents,

T.L.C.

whether created *before* or *after* the passing of the act, in which a life interest is created by an instrument *subsequent* to the statute (*Knight v. Boughton*, 12 Beav. 312; *Plummer v. Whiteley*, Johns. 585). In short, by adopting this construction, it is observed by Sir W. Page Wood, V. C., "the statute would reach all cases where either the lease reserving the rent, or the instrument creating the life interest, should be subsequent in date to the act. The strong argument for this construction is, that any other view would reduce to silence the first portion of the clause, because the second part alone would then be sufficient to take in every case, as it would operate on leases, whether granted before or after the act, as was held in *Knight v. Boughton* (12 Beav. 312). But if the clause is read as containing two distinct enactments, the first part would be necessary, if the legislature meant to include the case of a lease granted after the act under a previously existing power, for that would not fall within the words of the latter portion of the clause." Johns. 590; see also *Wardroper v. Cutfield*, 33 L. J., Ch. 605; *Llewellyn v. Rous*, 2 L. R., Eq. 27; 35 Beav. 591.

It was at one time held that the statute 4 & 5 Will. 4, c. 22, only applied to cases where the interest of the person interested in rents and payment terminated by his death or the death of another person. See *Campbell v. Campbell*, 7 Beav. 482.

It has, however, been since decided that whenever a person is in receipt of rents and profits, and any

X

change takes place, whereby that person's interest ceases or is altered, and another interest begins, or a change of interest takes place, although without a death, then an apportionment must be made. Thus a tenant for life after the expiration of a term to accumulate rents, is not entitled to the whole of the rents which become payable after that period; but there must be, under 4 & 5 Will. 4, c. 22, an apportionment. *St. Aubyn v. St. Aubyn*, 1 Drew. & Sm. 611; see also *Shipperdson v. Tower*, 8 Jur. 485; *Wheeler v. Tootel*, 3 L. R., Eq. 571; *Donaldson v. Donaldson*, 10 L. R., Eq. 635, 639.

It was also held that the statute 4 & 5 Will. 4, c. 22, did not apply between the real and personal representatives of a person whose interest was not terminated at his death; there was no apportionment, therefore (previous to the passing of 33 & 34 Vict. c. 35), where a person died seised in fee, as his heir at law would take the whole of the rent (*Browne v. Amyot*, 3 Hare, 173; see also *Beer v. Beer*, 12 C. B. 60). So where there was a devise in trust for one for life, remainder to his first and other sons in tail, remainder to the testator's own right heirs. The devisee for life proved to be heir at law of the testator and died intestate, and without having had issue. It was held by Sir W. Page Wood, V.C., that notwithstanding the interposition of an estate tail which might have arisen and prevented the remainder in fee from vesting absolutely, the death of the devisee was not a "determination of his interest" within the

meaning of 4 & 5 Will. 4, c. 22, and that, therefore, upon the authority of *Browne v. Amyot*, the rents were not apportionable between his heir and personal representatives. *In re Clulow's Estates*, 3 K. & J. 689.

The Apportionment Act (4 & 5 Will. 4, c. 22) only applies to rents reserved at fixed periods, and does not apply to royalties in the nature of rents, payable at uncertain periods; such as royalties payable upon the selling of ore got from a mine. *St. Aubyn v. St. Aubyn*, 1 Drew. & Sm. 611; but see *Llewellyn v. Rous*, 35 Beav. 591; 2 L. R., Eq. 30, where Lord Romilly, M. R., differing from the opinion expressed by Wood, V.-C., in *St. Aubyn v. St. Aubyn*, held that royalties were apportionable, observing "that the act was a remedial act: it was intended to give the person whose interest expired what was considered the fair and proper allowance of the income up to the time of his death, and therefore I think the statute must be construed liberally."

Moreover, the Apportionment Act (4 & 5 Will. 4, c. 22) does not apply to rents payable by tenants from year to year, which have not been reserved by an instrument *in writing*. *In re Markby*, 4 My. & Cr. 484; *Cattley v. Arnold*, 1 J. & H. 651; *In re Alexander*, 4 Ir. Ch. Rep. 257; *Brown v. Candler*, 9 L. J., Ch. 212; *Mills v. Trumper*, 4 L. R., Ch. App. 320, reversing S. C., 1 L. R., Eq. 671; but see *Kevill v. Davies*, 15 Sim. 466; *Cattley v. Arnold*, 1 J. & H. 660.

It has, however, been held that an award of the Tithe Commissioners, substituting a rent-charge

for tithes, was "an instrument under which the rent-charge was made payable," under sect. 2 of the act; and being after the act, the rent-charge upon the death of the tenant for life, under a will executed before the act, was apportionable. *Heasman v. Pearse*, 8 L. R., Eq. 599.

Orders, however, of the Court of Chancery have been held not to be "instruments" within the meaning of this act. Thus, where lands subject to a settlement made before the act (4 & 5 Will. 4, c. 24), were taken by a company, under the Lands Clauses Consolidation Act, and the dividends, by orders subsequent to the act, were ordered to be paid to the tenant for life, upon the death of the tenant for life, his executrix was held not to be entitled to an apportionment of the dividends from the last payment up to the date of his death, as orders of the Court were not instruments within the meaning of the act. *In re Lawton Estates*, 3 L. R., Eq. 469.

It seems that the statute does not apply, and that consequently there would be no apportionment thereunder, when a landlord determined the relation of landlord and tenant by his own act, as by a re-entry (*Oldershaw v. Holt*, 12 Ad. & Ell. 590); but semble, that it did to a composition for tithes. *Oldham v. Hubbard*, 2 Y. & C. C. C. 209.

A mortgagee who is not in possession is not an assign of the mortgagor within the meaning of 4 & 5 Will. 4, c. 22, s. 2, so as to be entitled to an apportionment of the rent due at the death of the mortgagor. *In re Marquis of Anglesey's Estate*, 17 L. R., Eq. 283.

It must be remembered that now, by 14 & 15 Vict. c. 25, s. 1, it is enacted, "that, where the lease or tenancy of any farm or lands, held by a tenant at *rack rent*, shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate, and the succeeding landlord or owner shall be entitled to recover and receive of the tenant in the same manner as his predecessor or such tenant's lessor could have done, if he had been living, or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor, to the time of the tenant so quitting; and the succeeding landlord or owner and the tenant respectively shall, as between themselves, and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions and restrictions, to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid, at the expiration of such current year: Provided always, that no notice to quit shall be necessary,

or required by or from either party to determine any such holding and occupation as aforesaid."

In order to exclude apportionment under stat. 4 & 5 Will. 4, c. 22, either an express direction that there shall be none, or languageso express in the terms of gift that apportionment is clearly impossible consistently with it, is required. Inference from the whole tenor and context of the will is not sufficient to exclude the operation of the statute. *Tyrrell v. Clark*, 2 Drew. 86.

Although there is an express clause of apportionment in case of the determination of an annuity in one event, as, for instance, the death of the grantee between two days of payment, no intention can be presumed that there should be an apportionment on the determination of the annuity by the death of the grantor. *Leathley v. Trench*, 8 Ir. Ch. Rep. 401.

A great improvement in the law was effected by the Apportionment Act, 1870 (33 & 34 Vict. c. 35), taking effect from 1st of August, 1870, whereby, after reciting 11 Geo. 2, c. 19; 4 & 5 Will. 4, c. 22; 6 & 7 Will. 4, c. 71; 14 & 15 Vict. c. 25; and 23 & 24 Vict. c. 154, it enacts, that "From and after the passing of this act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." Sect. 2.

"The apportioned part of any

such rent, annuity, dividend or other payment, shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment, when the entire portion of which such apportioned part shall form part shall become due and payable, and not before; and in the case of a rent, annuity, or other such payment determined by re-entry, death or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before." Sect. 3.

"All persons, and their respective heirs, executors, administrators and assigns, and also the executors, administrators and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically; but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this act, or otherwise, would have been entitled to such entire or

continuing rent; and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this act to the same, by action at law or suit in equity." Sect. 4.

"In the construction of this act

"The word 'rents' includes rent-service, rent-charge and rent-seek, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe.

"The word 'annuities' includes salaries and pensions.

"The word 'dividends' includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise, out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times, or otherwise; and all such divisible revenue shall, for the purposes of this act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made, but the said word 'dividend' does not include payments in the nature of a return or reimbursement of capital." Sect. 5.

"Nothing in this act contained shall render apportionable any annual sums made payable in policies of assurance of any description." Sect. 6.

"The provisions of this act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place." Sect. 7.

It has been held in Ireland that

the Apportionment Act, 1870, has not the effect of altering the usual contract of purchase, so as to entitle a purchaser to obtain, out of the purchase money lodged by him, the portion of the head-rent from the last gale-day to the time of his purchase. *In re Keillor's Estate*, 6 I. R., Eq. 329.

Since this act, the rents of an estate of which a person dies seised in fee are apportionable, whether he dies intestate, or whether he has devised the estate, if he has not disposed of the rents in a different manner, so that his personal representatives will take the portion of the rents due up to the day of his death, and the person who becomes entitled to the reversion to which the rent is incident will retain the other portion (*Roseingrave v. Burke*, 7 I. R., Eq. 186, 190); but the person seised in fee may by his will direct that the whole of the rents may go with the lands to the devisee or heir, or he may dispose of each portion separately, and give each to any person or persons as he pleases. *Ib.* 190; and see *Lindsay v. The Earl of Wicklow*, 6 I. R., Eq. 72; *Sealy v. Stawell*, 2 I. R., Eq. 326.

Where, after the passing of the Apportionment Act, 1870, a testator dies seised in fee of real estate, the rents will be apportionable as between the executor and devisee (*Capron v. Capron*, 17 L. R., Eq. 288), and it is immaterial that the will is dated before the passing of the act (*Ib.*), or whether the testator devises it in strict settlement or in fee. *Ib.* 293. See also *Roseingrave v. Burke*, 7 I. R., Eq. 186; *Hasluck v. Pedley*, 19 L. R., Eq. 271.

The better opinion appears to be that the Apportionment Act, 1870, applies to all instruments, whether coming into operation before or not till after the passing of the act. See *In re Cline's Estate*, 18 L. R., Eq. 213, where dividends on a fund in Court, representing real estate of a testator who died in 1827, were held apportionable as between successive tenants for life.

It is, at any rate, clearly applicable to a will made before the act and confirmed by a codicil (*Capron v. Capron*, 17 L. R., Eq. 288), or to which a codicil is made (*Hasluck v. Pedley*, 19 L. R., Eq. 271) after the passing of the act. Sed vide *Jones v. Ogle*, 14 L. R., Eq. 419; 8 L. R., Ch. App. 192.

The same act is also applicable to specific as well as to residuary devises or bequests. *Hasluck v. Pedley*, 19 L. R., Eq. 271; *Pollock v. Pollock*, 18 L. R., Eq. 329, explaining *Whitehead v. Whitehead*, 16 L. R., Eq. 528.

But it has been held that dividends in respect of profits earned by a mining company during the previous year, which were declared yearly, did not come within the terms "dividend" or "periodical payment" in this act, and were therefore not apportionable. *Jones v. Ogle*, 14 L. R., Eq. 419; 8 L. R., Ch. App. 192.

Where a testator charges an annuity on land with the ordinary power of distress and entry, in the event of the annuity being in arrear, the annuitant must wait for payment of the annuity until the first rent day which occurs after the day fixed by the testator for pay-

ment of an instalment of the annuity, and is not entitled to require that any prior rent should be kept in hand in order to answer the first instalment. *Hasluck v. Pedley*, 19 L. R., Eq. 271.

Apportionment of Rent upon the Division of Land.

Although we have seen that at common law, as a general rule, rent was never apportioned in respect of time, it may, in many cases, be apportioned upon the division of the land out of which the rent issues.

Thus, if a person who has a *rent service* purchase part of the land from which it issues, the rent will be extinguished *only* as to the part purchased, and the amount which will in future have to be paid will be apportioned according to the value of the land (Litt. sect. 222).

So, likewise, if a lessee for life or years surrender part of the land to the lessor (Co. Litt. 148 a), or the lessor enter upon part of the land for a forfeiture in part (Ib.), the rent will be apportioned.

So, likewise, if the lessor grant or devise part of the reversion, the rent which is incident to the reversion will be apportioned. Ib.; *Collins v. Harding*, 13 Co. 57 a; *Stevenson v. Lambard*, 2 East, 575; *O'Connor v. O'Connor*, 4 I. R., Eq. 483.

Concerning the apportionment of rents, these distinctions are laid down by Lord Coke between a *grant* and a *reservation* of a rent. That if a man be seised of one acre of land in fee simple, and of another in tail, and by deed *grant* a rent out of both in fee, in tail, for life or for years, upon his death the entailed land will

be discharged, but the land in fee simple will remain charged with the *whole* rent; "for against his own grant he shall not take advantage of the weakness of his own estate in part. But if he make a gift in tail, a lease for life or for years, of both acres, *reserving* a rent, and upon his death the issue in tail avoid the gift or lease, the rent will be apportioned; for seeing the rent is reserved out of and for the whole land, it is but reasonable, when part is evicted by an elder title, that the donee or lessee should not be charged with the whole rent, but that it should be apportioned rateably according to the value of the land." Co. Litt. 148 b.

If the grantee of a *rent-charge* releases part of his rent to the tenant of the land (Co. Litt. 147 b), or to a stranger, and the tenant (previous to 4 & 5 Anne, c. 16) attorned (Co. Litt. 148 a), the rent would be apportioned, and since the last-mentioned statute attornment is unnecessary. If, however, the owner of the rent-charge purchase only *part* of the land from which the rent-charge issues, it will, as we shall hereafter show more fully, be entirely extinguished. Post, p. 331.

So a rent-charge may be apportioned by act of law, as when part of it is extended upon a scire facias (*Wotton v. Shirt*, Cro. Eliz. 742; Gilb. Rents, 165), or formerly, when a moiety was extended upon an elegit (*Campbell's Case*, 1 Roll. Abr. 237, "Apportionment," 4), or if part of the lands subject to the rent-charge descend to the grantee. Litt. sect. 224; Gilb. Rents, 156.

Where a lessee is evicted from

part of the demised premises, by a title paramount to that of his landlord, there will be an apportionment of the rent (1 Roll. Abr. 235, "Apportionment" (B); *Stevenson v. Lambard*, 2 East, 575). If, however, he be evicted from part of the premises by his landlord, a suspension of the whole rent during the continuance of the eviction will take place. *Morrison v. Chadwick*, 7 C. B. 283; *Newton v. Allin*, 1 Q. B. 519.

Where part only of land comprised in leases for terms of years is taken for public purposes under the provisions of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), the rent will be apportioned. Sect. 119. So where property included in a lease or underlease is required for the purposes of the Church Building Acts. See 17 & 18 Vict. c. 32.

V. Remedies for enforcing the Payment of Rent.

Action of Debt.

Formerly an action of debt would not lie to recover a freehold rent-charge as long as the freehold continued, as the law would not suffer a real injury to be remedied by an action that was merely personal; but after the freehold came to an end, an action of debt would lie. Thus, if a man made a lease for life reserving rent, and the rent was in arrear, on the death of the lessor, the executors during the life of the tenant for life could not have an action of debt, but after the estate for life determined, the action would be maintainable. *Oguel's Case*, 4 Co. Rep. 49 b; *Sharp's Case*,

4 Co. Rep. 51 a, cited; *Sir W. Leving's Case*, 26 Edw. 3, 64.

Upon the same principle, where the remedy for the recovery of a rent-charge in fee by a real action was abolished by 3 & 4 Will. 4, c. 27, s. 36, an action of debt would lie for the recovery of a rent-charge in fee. See *Thomas v. Sylvester*, 8 L. R., Q. B. 368; *Varley v. Lee*, 2 Ex. 446; 17 L. J., Ex. 289; *Dodds v. Thompson*, 1 L. R., C. P. 137.

But such action, not being a transitory but a local action, it was held before the Judicature Acts that an action of debt for arrears of a rent-charge upon land in Australia was not maintainable in England. *Whitaker v. Forbes*, 10 L. R., C. P. 583; 1 C. P. D. 51.

The lessor or a person to whom he has assigned the rents (*Williams v. Hayward*, 1 Ell. & Ell. 1040) may bring an action to recover the rent in arrear. Formerly it was a matter of some importance to determine what was the nature of the action, whether it should be an action of debt on simple contract, assumpsit for the use and occupation of the premises, or covenant. This, however, became immaterial since the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), which rendered it unnecessary to mention in the writ by which an action for rent is commenced what is the form of action.

An action, however, for rent cannot be brought by a landlord who has distrained for rent, and has not sold the goods held under the distress, and it is immaterial that they are not sufficient to satisfy the rent.

Lehain v. Philpott, 10 L. R., Ex. 242.

Re-entry under a Condition.

The lessor may also take advantage of a condition of re-entry, or for making void the lease, on non-payment of the rent. But in process of time this remedy became at law (4 Geo. 2, c. 28, s. 2, repealed by 30 & 31 Vict. c. 59, after having been previously with a few unimportant variations re-enacted and in effect superseded by 15 & 16 Vict. c. 76), as well as in equity (2 L. C. Eq. 1117, 5th ed.) a mere security for the rent. See also 23 & 24 Vict. c. 126, ss. 1, 2, 3.

A distress put in by the landlord, after he commenced an action of ejectment for breaches of covenant, has been held not to have the effect of waiving the breaches previous to the distress, or of affirming the tenancy. *Grinwood v. Moss*, 7 L. R., C. P. 360; see also *Jones v. Carter*, 15 M. & W. 718.

As to the remedy of the landlord, when a tenant in arrear deserts the premises without leaving sufficient goods for a distress, see 11 Geo. 2, c. 19, s. 16, re-enacted by 15 & 16 Vict. c. 76, s. 210. See notes on this section, Day's Common Law Procedure Acts, p. 148; ante, p. 34.

Distress for Rent.

The most summary and efficient remedy of a landlord to obtain payment of his rent is that of *distress*, the origin of which has been before mentioned.

There must, however, exist the relation of landlord and tenant, by means of a demise of premises at a

rent, in order to give the former a power of distress. He cannot, for instance, distrain on non-payment of a stipulated periodical payment for a privilege or easement. See *Hancock v. Austin*, 14 C. P., N. S. 634. There the owner of a factory, consisting of several rooms, was in the habit of letting "standings" therein for lace machines, he himself supplying the power for working them; there being no demise of the room, it was held by the Court of Common Pleas that the weekly payments could not be distrained for as "rent."

Where, however, A. let to B. a defined portion of a room in a factory, with steam power for working lace machines belonging to B., at a certain sum per annum payable quarterly, a deduction being allowed in the event of hindrances in the supply of power beyond seven days in each quarter; it was held by the Court of Common Pleas a sufficient demise to entitle A. to distrain. "I arrive," said Willes, J., "at the conclusion that the letting was not a mere letting of an onstand for the lace machines, but a letting of a defined portion of the room separated from the remaining portion, with exclusive possession by the person taking it, and that possession was taken under that demise. If that be so, the supply of steam power and gas would be merely ancillary, and a rent reserved for the whole would be construed as issuing out of the fixed property, as in the case of furnished apartments, and there would in like manner be a power to distrain,

though the use of moveable property formed part of the consideration of the rent." *Selby v. Greaves*, 3 L. R., C. P. 594, 602.

As a general rule, a landlord may distrain all the personal chattels found on the demised premises (Gilb. Distress, 33). And it seems, also, on other lands of the lessee over which he may grant to the lessor a power of distress. *Butt's Case*, 7 Co. 23, 24; Co. Litt. 147 a, which was the case of a rent-charge.

But such grant of a power of distress must be over definite lands (Year Book, 9 H. 6, 9 a; Pasch. pl. 23). Hence, grant of a distress over other lands, not naming them, is void for uncertainty (Year Book, 41 E. 3, 15 b, 16 a; Trin. pl. 8). And so a power of distress cannot be granted over lands which may at any time afterwards become the property of the lessee. Thus, in a recent case, where the lessees of mines covenanted that any of their lands, whatever might be their extent or value, should become liable to a distress for the rent reserved, if a pit were dug within them communicating with the mines, it was held by the Court of Exchequer that this power of distress did not run with lands owned by the lessees at the time of the demise, so as to bind them in the hands of assignees. *Daniel v. Stepney*, 7 L. R., Ex. 327.

There are, however, certain chattels which have the privilege of not being liable to be taken by distress. In the first instance, a fixture annexed to the freehold, which might, it seems, be removed

as against the landlord, or taken under an execution by fieri facias (*Poole's Case*, 1 Salk. 368), cannot be taken by distress, unless it can be removed without injury to itself or the freehold, and the annexation has taken place merely for temporary purposes, and for the more complete enjoyment and use of the fixture as a chattel. See *Co. Litt.* 47 b; *Niblet v. Smith*, 4 T. R. 504; *Gorton v. Falkner*, 4 T. R. 567; *Duck v. Braddyl*, M'Cl. 217; *Trappes v. Harter*, 2 Cr. & M. 177; *Darby v. Harris*, 1 Q. B. 895; *Hellawell v. Eastwood*, 6 Exch. 295; *Lane v. Dixon*, 3 C. B. 776; and see *Turner v. Cameron*, 5 L. R., Q. B. 306, where it was held that railways connected with coal mines, being annexed to the soil, were fixtures, and therefore not distrainable. The principle upon which the cases turn is, that as a distress merely provides a pledge for payment of the rent, nothing ought to be so taken, unless it can be returned in the same condition as it was found (*Termes de la Ley*, "Distress," 269; *Co. Litt.* 47 a); and if fixtures be improperly taken by distress, the tenant can bring trover for them as goods and chattels. *Dalton v. Whitem*, 3 Q. B. 961; *Roffey v. Henderson*, 17 Q. B. 574.

Upon this principle, sheaves or shocks of corn could not at common law be taken in distress for rent (*Co. Litt.* 47 a); but now, by 2 Will. & Mary, c. 5, sheaves or cocks of corn, or corn loose or in the straw, or hay in any hovel, stack, or rick, or otherwise on the land,

may be distrained for rent on demise, lease, or contract.

At common law growing corn could not be distrained, because it adheres to the freehold. 1 Roll. Abr. 666, H. pl. 4. But by 11 Geo. 2, c. 19, *lessors or landlords* can distrain all sorts of corn, grass, or *other product* growing on the estate demised, and cut and gather them when ripe (s. 8). This statute is not applicable to young trees growing in a nursery ground, the word "product" being confined to things of the same nature, as corn and grass (*Clark v. Gaskarth*, 8 Taunt. 431). Nor can a grantee of an annuity with a power of distress distrain growing crops under it, inasmuch as that privilege is only conferred upon lessors and landlords. *Miller v. Green*, 8 Bing. 92.

As a general rule, the goods of a stranger upon the land demised may be distrained for rent so long as such goods remain on the land. See *Foulger v. Taylor*, 5 H. & N. 210; *Cramer v. Mott*, 5 L. R., Q. B. 357.

There were, however, some important exceptions to the rule. Thus chattels were privileged from distress which had been intrusted to a person to bestow labour upon them in the course of his trade or occupation. Thus if a horse were sent to a smith's shop to be shod, materials to a weaver's shop to be made into cloth, cloth to a tailor's to be made into a garment, sacks of corn or meal to a miller to be ground (*Co. Litt.* 47 a), goods to an auctioneer or commission agent to be sold (*Adams v. Grane*, 1 Cr. & M. 380; 3 Tyrw. 326; *Findon v.*

M'Laren, 6 Q. B. 891; *Williams v. Holmes*, 8 Exch. 861; *Brown v. Arundell*, 10 C. B. 54), while on his premises (*Lyons v. Elliott*, 1 Q. B. D. 210); goods pledged with a pawnbroker (*Swire v. Leach*, 18 C. B., N. S. 479; 34 L. J., C. P. 150), or deposited for safe custody with a warehouseman (*Miles v. Furber*, 8 L. R., Q. B. 77), or wharfinger (*Swire v. Leach*, 18 C. B., N. S. 479), the property of persons at an inn (*Crosier v. Tomkinson*, 2 Ld. Ken. 439; Bac. Abr. "Inns and Labourers" (B)), or a beast at a butcher to be slaughtered (*Brown v. Shevill*, 2 Ad. & Ell. 138), such chattels could not be taken by a distress for the rent due from the persons to whose charge they had been severally committed. See also *Gisbourn v. Hurst*, 1 Salk. 249; *Gilman v. Elton*, 3 Brod. & B. 75; *Thompson v. Mashiter*, 1 Bing. 283; *Mathias v. Mesnard*, 2 C. & P. 353; *Gibson v. Ireson*, 3 Q. B. 39.

The reason of these exemptions was for the benefit of trade, which might be injured if persons were afraid to intrust their goods to poor tradesmen. Co. Litt. 47 a.

The Courts formerly did not seem inclined to carry the exception to cases which did not fall within the reason by which it was established (see *Muspratt v. Gregory*, 1 M. & W. 633; 3 M. & W. 677; *Joule v. Jackson*, 7 M. & W. 450). In *Parsons v. Gingell* (4 C. B. 545), a horse and carriage at livery was held distrainable; but in *Miles v. Furber* (8 L. R., Q. B. 82), Cockburn, C. J., said that he was inclined to think that the case of horses and carriages at livery must

be taken as trenching upon the principle applicable to deposits with a pawnbroker.

There is an old case in which it is said that cattle taken in to agist are distrainable. See Roll. Abr. Distress, (1) pt. 22, 23, translated in Viner, Abr. under the same title. See also *Fowkes v. Joyee*, 2 Vent. 50; 3 Lev. 260; and 2 Vern. 129. In the recent case, however, of *Miles v. Furber* (8 L. R., Q. B. 83), Mellor, J., says: "I cannot help thinking that if it were shown that a person exercised the trade of agisting cattle, the same principle would apply as in the case of a pawnbroker."

In order to prevent the great loss and injustice to which lodgers were subjected by the exercise of the power possessed by the superior landlord, to levy a distress on their furniture and goods and chattels, for arrears of rent due to such superior landlord by his immediate lessee or tenant, it has been enacted by 34 & 35 Vict. c. 79, that "If any superior landlord shall levy, or authorize to be levied, a distress on any furniture, goods or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods or chattels so distrained or threatened to be distrained upon, and that such furniture, goods or chattels are the pro-

perty or in the lawful possession of such lodger; and also setting forth whether any and what rent is due, and for what period, from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff, or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods and chattels referred to in the declaration; and if any lodger shall make or subscribe such declaration and inventory, knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanor." Sect. 1.

"If any superior landlord, or any bailiff or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods or chattels of the lodger, such superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary

magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise, as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into." Sect. 2.

"Any payment made by any lodger pursuant to the 1st section of this act, shall be deemed a valid payment on account of any rent due from him to his immediate landlord." Sect. 3.

The fact that a person is an under-tenant as well as a lodger does not disentitle him to the protection of the act. *Phillips v. Henson*, 3 C. P. D. 26.

By a subsequent act, 35 & 36 Vict. c. 50, railway rolling stock is, in certain cases, protected from distress when on hire.

Things, also, which are in actual use, as a horse on which a person is riding, an axe with which a person is cutting wood, and the like, are privileged from distress for rent. Co. Litt. 47 a; and see *Simpson v. Hartopp*, Willes, 512; 1 Smith's L. C. 187, and note. The reason for this exemption is, that if persons were deprived of things which they are actually using, it would probably excite them to commit a breach of the peace, which it is good public policy to avoid.

Things in the custody of the law, as, for instance, if they have been distrained damage feasant (Co. Litt. 47 a), or taken in execution (*Peacock*

v. *Purvis*, 2 Brod. & B. 362; *Wharton v. Naylor*, 12 Q. B. 673), are not liable to distress.

But no goods taken on any lands leased for life, years, at will, or otherwise, shall be *taken in execution*, unless the *party at whose suit* execution is sued, *before removal* of the goods, pay to the landlord the arrears of rent, if not exceeding one year's rent, and if more, then the amount of one year's rent due at the time of the execution. 8 Anne, c. 14, s. 1.

The meaning of this enactment is, that the seizure is lawful *primâ facie*, but that the sheriff shall not remove the goods until a year's rent be first paid; if they be removed without payment of rent, after notice that it is due, such removal renders the whole proceeding unlawful, as regards the landlord, and subjects the sheriff to an action on the case at his suit. See *Riseley v. Ryle*, 11 M. & W. 16, 19, 20; *Wharton v. Naylor*, 12 Q. B. 678.

But neither a bill of sale of the goods (*Smallman v. Pollard*, 6 M. & G. 1001), nor a receipt of the proceeds under such bill of sale, will amount to a removal of the goods, so as to subject the sheriff to an action. *Wharton v. Naylor*, 12 Q. B. 673, 678.

But if the sheriff receives the proceeds under the bill of sale, either from a stranger or the vendee absolutely, or from the execution creditor constructively, he, being an officer of the Court, will be compelled on motion to pay over a year's rent to the landlord. *West v. Hedges*, 6 M. & G. 1004 n.; *Henckett v. Kimpson*, 2

Wils. 140; *Culvert v. Joliffe*, 2 B. & Ad. 418.

In the case of growing crops, if the sheriff sold for a sum to be paid on reaping and removal of the crops, he could not be called upon by the landlord to pay his rent until the time came for removal of the crops. *Wharton v. Naylor*, 12 Q. B. 679. And see *Bible v. Hussey*, 2 I. R., C. L. 308, on the construction of the Irish act 9 Anne, c. 8, s. 1.

Growing corn sold under an execution could not formerly be distrained for rent, unless the purchaser allowed it to remain an unreasonable time on the ground after it was ripe (*Peacock v. Purvis*, 2 Bro. & Bing. 362; *Wright v. Dewes*, 1 Ad. & Ell. 641); but now by 14 & 15 Vict. c. 25, s. 2, growing crops seized and sold by the sheriff under an execution are liable, as long as they remain on the land, to be distrained for the rent which becomes due after the seizure and sale, provided there is no other sufficient distress.

By 56 Geo. 3, c. 50, the sheriff cannot sell crops agreed to be expended on lands (s. 1), save on the terms of their being so expended (s. 3); nor can the landlord distrain thereon if severed, nor on turnips, nor on the beasts or implements required for carrying or consuming such produce. Sect. 6.

Goods under the custody of a messenger under a fiat in bankruptcy have been held not privileged from distress (*Briggs v. Sowry*, 8 M. & W. 729); nor are goods left by an official liquidator on the demised premises of a company that is being wound up under the Com-

panies Act, 1862. *In re Lundy Granite Company, Ex parte Heavan*, 6 L. R., Ch. App. 462; *In re Regent United Service Stores*, 8 Ch. D. 616.

The power of distress, however, is always subservient to prerogative process issued by the crown, such as an extent; and the sheriff may consequently take goods that have been distrained out of the hands of the landlord or his bailiff, and sell them for the benefit of the crown. *Re v. Cotton, Parker*, 112.

It has been laid down by Lord Coke that a distress can only be had of a thing "whereof a valuable property is in somebody." And that "therefore dogs, bucks, does, conies, and the like, that are ferre naturæ, cannot be distrained." Co. Litt. 47 a. But dogs being now considered by the law as valuable, there seems to be no reason why they should not be taken by distress (see *Wright v. Ramscott*, 1 Saund. 83; *Binstead v. Buck*, 2 W. Black. 1117), since deer kept in a private inclosure can be distrained. *Davies v. Powell, Willes*, 48.

Some things are *conditionally* privileged from distress; that is to say, if there are other goods sufficient for the purpose to be found on the premises. Amongst these may be mentioned beasts belonging to the plough—*averia carneæ* (Co. Litt. 47 a), sheep (Ib. note 17, *Keen v. Priest*, 4 H. & N. 236), utensils or instruments of a man's trade or occupation, as the axe of a carpenter or the books of a scholar (Co. Litt. 47 a). See also *Fenton v. Logan*, 9 Bing. 676; *Gorton v. Falkner*, 4 T. R. 565.

But the landlord is not obliged

to distrain grass or growing corn before taking things conditionally privileged, as beasts of the plough. See *Piggott v. Birtles*, 1 M. & W. 451.

Cart colts and young steers not broken or used for harness or the plough are not privileged from distress as beasts which gain the land. *Keen v. Priest*, 4 H. & N. 236.

Where tenants in common of land mortgage it to secure a debt which they jointly and severally covenant to pay, and each of them separately attorns tenant to the mortgagees of a part of the estate of which they were jointly in occupation at a rent equal to half the annual interest of the mortgage debt, the mortgagees cannot distrain for the rent goods which were the partnership property of the mortgagors in respect of a business which they carried on upon the mortgaged estate. *Ex parte Parke, In re Potter*, 18 L. R., Eq. 381.

Where the Landlord may distrain.

Except in the case of the Queen, who may distrain on all the lands in the occupation of a tenant, of whomsoever they may be held (Com. Dig. Distress (A), 3), a lessor, as a general rule, can only distrain goods on the demised premises (Ib. (B), 1; Co. Litt. 161 a; *Capel v. Buzzard*, 6 Bing. 150), and cattle and stock may be distrained upon any common appendant or appurtenant, or any ways belonging to all or any part of the premises demised or holden. 11 Geo. 2, c. 19, s. 8.

And the Statute of Marlebridge, c. 15 (52 Hen. 3), which was in affirmation of the common law,

enacted that with the exception of the king, no one should distrain "out of his fee, nor in the king's highway, nor in the common street." See 2 Inst. 131.

There are, however, exceptions to the rule. Thus, if the landlord came to distrain cattle which he sees then within his fee, and the tenant or some other person, to prevent the distress, drive them out of the fee, yet the landlord may freshly follow, and distrain them out of his fee, for, in the judgment of law, the distress is taken within his fee. Co. Litt. 161 a.

But it seems that if the lord had no view of the cattle within his fee, though the tenant drive them off purposely, or if the cattle of themselves, after the view, go out of the fee, or if the tenant, after the view, remove them for any other cause than to prevent the distress, then the landlord cannot distrain out of his fee. Ib.

Where, however, the tenant fraudulently or clandestinely removes his goods in order to prevent their being distrained, the landlord may within *thirty days* follow and distrain them wherever they may be found, except in the hands of a purchaser for valuable consideration, without notice (8 Anne, c. 14, s. 2; 11 Geo. 2, c. 19, s. 1). It will be observed that the landlord may follow the goods, if the removal be fraudulent, although not clandestine (*Opperman v. Smith*, 4 D. & R. 33; *Inkop v. Morchurch*, 2 Fos. & F. 501); and it is immaterial whether the person on whose premises the goods are found is privy to the

fraud. *Williams v. Roberts*, 7 Exch. 618.

These statutes, however, do not enable the landlord to follow and distrain the goods of a third party, which have been removed from the demised premises (*Thornton v. Adams*, 5 M. & S. 38; *Postman v. Harrell*, 6 C. & P. 225); and a stranger has a perfect right to remove his goods at any time or under any circumstances, in order to avoid a distress. This right is founded upon the clearest principles of justice. The stranger does not owe the rent, and is under no obligation, legal or moral, to allow his goods to be seized to pay the debts of a third person. Per Martin, B., in *Foulger v. Taylor*, 5 H. & N. 210.

When the Distress is to be made.

A landlord can only make a distress in the daytime, that is to say, between sunrise and sunset, the reason being that the tenant might be able to see the landlord or his bailiff coming, and avoid the distress by making a tender (Co. Litt. 142; Gilb. on Distress, 50; *Aldenburgh v. Peaple*, 6 C. & P. 212; *Tutton v. Darke*, and *Nixon v. Freeman*, 5 H. & N. 647). Hence, as the rent does not become due till the last minute of the day on which it is payable, the landlord cannot, in the absence of any contract or custom by which the rent is payable earlier (*Lee v. Smith*, 9 Exch. 662; *Buckley v. Taylor*, 2 T. R. 600), distrain before sunrise of the next day. Co. Litt. 47 b, note 6; *Duppa v. Mayo*, 1 Wms. Saund. 282.

At common law a landlord could

not distrain for rent after the term was ended. The consequence was, that as a landlord could not distrain for rent the day it was due but the day after, when the term was ended, he could not, unless he by contract made the rent payable before the expiration of the term, have any remedy by distress for his last half-year's rent (Co. Litt. 47 b). The legislature, however, has interposed to prevent the inconveniences arising from such a state of the law, and by 8 Anne, c. 14, s. 67, rent may be distrained for *after* determination of the lease in the same manner as before, if the distress is made within *six calendar months* afterwards, and during the continuance of the landlord's title and the *possession* of the tenant from whom the arrears are due.

In construing this statute it has been held, that the landlord may distrain part of the demised premises, if the tenant is no longer in possession of the whole (*Nuttall v. Staunton*, 4 B. & C. 51), or upon the representatives of a tenant who had entered. *Braithwaite v. Cooksey*, 1 H. Black. 465.

And where there is a custom of the country for the tenant to leave his away-going crop in the barns for a certain period after the termination of the tenancy, the landlord may distrain, though six months have elapsed since that time. *Beavan v. Delahay*, 1 H. Black. 5; *Griffiths v. Puleston*, 13 Mees. & W. 358.

But where the tenant has himself left after the expiration of the term, leaving some cattle on the premises

and a new tenant has entered, the landlord cannot put in a distress, as there is no *continuance* of the tenant in possession within the meaning of the act (*Taylorson v. Peters*, 7 Ad. & Ell. 110). Nor is the statute applicable where the tenancy is determined by the wrongful disclaimer of the tenant. *Doe d. David v. Williams*, 7 C. & P. 322.

Where proceedings are taken upon an avowry at common law for rent in arrear and not under the statute, it must be alleged that at the time when the distress was made it was during the continuance of the landlord's title or interest. *Williams v. Stiven*, 9 Q. B. 14.

How the Distress may be made.

The distress may be made either by the landlord himself personally, or by his agent or bailiff acting under a warrant of distress, which must be signed by the landlord, but does not require a stamp, and if there are several landlords, as in the case of joint tenants, the signature of one of them will be sufficient should the others not dissent (*Robinson v. Hoffman*, 4 Bing. 562); and although the bailiff distrain for rent due to himself, he may justify as bailiff of the person who gave him authority to distrain (*Trent v. Hunt*, 9 Exch. 14). A ratification by the landlord of a distress made by a person acting as his bailiff will be sufficient. Bro. Abr. "Traverse per sans ceo," pl. 3.

As to distresses by joint tenants, tenants in common, coparceners, mortgagees, and husband and wife, see *Smith & Soden, Land. & T.* 142,

143, 144, 2nd ed. Tenant pur autre vie can distrain in the life of cestui que vie, and for rent in arrear at the death of cestui que vie, by 32 Hen. 8, c. 37, s. 4. Tenant by elegit may distrain without attornment so long as the debt is unpaid, and the interest of his executor's debtor continues. *Lloyd v. Davies*, 2 Exch. 103; Bro. Distr. pl. 72.

And it may be laid down as a general principle of law, that if a lessor, having mortgaged his reversion, is permitted by the mortgagee to continue in the receipt of the rent incident to the reversion, he during such permission is *presumptione juris* authorized, if it should become necessary, to realize the rent by distress, and to distrain for it in the mortgagee's name, and as his bailiff. *Trent v. Hunt*, 9 Exch. 14, 24.

So likewise where a person purchases the equity of redemption of an estate, and pays off the mortgage, whereby all rights which were vested in the mortgagee become vested in him, and he takes an authority from the mortgagee to receive the rents, and an undertaking that he will, when called upon, execute a conveyance and complete the legal title, such person will have an implied authority to distrain in the name of the mortgagee (*Snell v. Finch*, 13 C. B., N. S. 651). A mere receiver of rents has no implied authority to distrain (*Ward v. Shew*, 9 Bing. 608; 2 Moo. & Sc. 756), although a receiver appointed by the Chancery Division has such power. *Pitt v. Snowden*, 3 Atk. 750; *Dancer v. Hastings*, 4 Bing. 2.

T.L.C.

A person is not obliged to justify a distress for the cause which he happened to assign at the time it was made. If he can show that he had a legal justification for what he did it is sufficient. Thus a man may distrain for rent and avow for heriot service. *Fitzherb. Avowry*, 232; 3 Co. 26; 7 T. R. 657; *Lucas v. Nockells*, 10 Bing. 172.

As the tenant may prevent the distress by tendering a sufficient sum to his landlord, so he may do so in the case of his bailiff. And the landlord, when he gives a warrant to his bailiff to distrain, is at law considered by implication to authorize him to receive the rent, if a tender thereof be made by the tenant (*Hatch v. Hale*, 15 Q. B. 10); and a tender of rent without expenses, after a warrant of distress is delivered to the broker but before it is executed, is a good tender. *Bennett v. Bayes*, 5 H. & N. 391.

But a mere tender to a servant (*Pilkington v. Hastings*, Cro. Eliz. 813), or to a broker's man left in possession under the distress, without actual authority to receive the rent, is bad (*Boulton v. Reynolds*, 2 Ell. & Ell. 369); but a tender to distrainer's wife, who had an implied authority to receive the rent, has been held good. *Browne v. Powell*, 4 Bing. 230.

With the exceptions hereinafter mentioned, the outer door of a house (*Browning v. Dann*, Bull. N. P. 81), or of a stable (*Brown v. Glenn*, 16 Q. B. 254), must not be broken open for the purpose of making a distress; otherwise an action of trespass will lie against the person making the distress. But the outer

Y

door may be opened in the usual mode, as by turning a key, lifting a latch or drawing back the bolt (*Ryan v. Shilcock*, 7 Exch. 72), and when once the outer door is properly opened, the person making the distress will be justified in breaking open any inner doors (see *Browning v. Dunn*, Bull. N. P. 81); and an entry to make a distress through an open window is lawful (*Nixon v. Freeman*, 5 H. & N. 647, 652); but it is not lawful forcibly to break (*Attack v. Bramwell*, 3 Best & Sm. 520), or even to open a window which was closed but not fastened. *Nash v. Lucas*, 2 L. R., Q. B. 590, 593; 8 Best & Sm. 531; and see *Handcock v. Austin*, 14 C. B., N. S. 434; 32 L. J., C. P. 252, 254.

In *Gould v. Bradstock*, 4 Taunt. 562, it was held by the Court of Common Pleas, that trespass would not lie against a landlord who occupied an apartment over a mill demised to his tenant, from which it was divided only by a boarded floor without any ceiling, for taking up the floor of his own apartment, and entering through the aperture to distrain for rent.

There is no illegality in distraining for rent by climbing over a fence and so gaining access to the house by an open door. *Eldridge v. Stacey*, 15 C. P., N. S. 458.

Having obtained an entrance on the premises, a seizure must be made of the goods to be taken in distress, to effect which slight acts will be held sufficient; and although they are allowed to be taken away for a temporary purpose, upon their return it will not be considered that

the distress was abandoned. *Swann v. Earl of Falmouth*, 8 B. & C. 456; *Hutchins v. Scott*, 2 Mees. & W. 809; *Wood v. Nunn*, 5 Bing. 10; *Kirby v. Harding*, 6 Exch. 234; *Hartley v. Mozham*, 3 Q. B. 701.

Seizure may be constructive as well as actual; it is enough that the landlord or his agent takes effectual means to prevent the removal of the article from off the premises, on the ground of the rent being in arrear, and he does this when he declares that the article shall not be removed till the rent is paid, at any rate if the words are capable of being carried into action. See *Cramer v. Mott*, 5 L. R., Q. B. 357, 359, 360; and see *Wood v. Nunn*, 5 Bing. 10.

Where a person in possession under a distress has been forcibly ejected from the premises (*Eagleton v. Gutteridge* (11 M. & W. 465), or if he has left them for a temporary purpose, without any intention of abandoning the distress, and on his return finds the door purposely locked against him, he may in either case break open the door for the purpose of re-entering on the premises. *Bannister v. Hyde*, 2 Ell. & Ell. 627. See also *Eldridge v. Stacey*, 15 C. P., N. S. 458.

The next thing to be done is to take an inventory of the things seized, and to leave it with notice in writing (*Wilson v. Nightingale*, 8 Q. B. 1034) of the distress at the chief mansion-house, or other most notorious place on the premises, charged with the rent distrained for. 2 W. & M. sess. 1, c. 5, s. 2.

The want of notice does not render the distress invalid (*Trent v. Hunt*,

9 Exch. 14), and an inaccuracy in stating the amount for which a distress has been made, as, for instance, where the landlord has distrained for a larger amount than was due, will not be actionable (see *Tancred v. Leyland*, 16 Q. B. 669; *Stevenson v. Newnham*, 13 C. B. 285, overruling *Taylor v. Henniker*, 12 Ad. & Ell. 488). In Ireland, however, where a distress cannot be made for rent which became due more than one year before the making of the distress (23 & 24 Vict. c. 152, s. 51), a distress by a landlord is unlawful, if the particular in writing of the rent demanded include rent which became due more than one year before the making of the distress. *Tracey v. Brennan*, 8 Ir. C. L. 527.

And under the 7th section of 11 Geo. 2, c. 19, the landlord or his agent, where goods have been fraudulently or clandestinely conveyed away and detained in any place, within thirty days as before mentioned (see p. 319, ante), upon obtaining the aid of a constable or peace officer (*Rieh v. Woolley*, 7 Bing. 651; *Cartwright v. Smith*, 1 M. & Rob. 284), if the place be a dwelling-house, having previously made an oath before a magistrate of reasonable grounds for suspecting that the goods are there, even without any previous request to open them (*Williams v. Roberts*, 7 Exch. 618), may break open the doors, it seems, without a previous request to open them, and take the goods in distress.

A removal of goods to bring it within the statute must have taken place *after* the rent became due

(*Furneaux v. Fotherby*, 1 Bing. N.S., 767, cited; and see *Watson v. Main*, 3 Esp. 15); and it has been decided that the landlord cannot make a seizure after he has conveyed away his reversion. *Ashmore v. Hardy*, 7 C. & P. 501; see also *Welch v. Myers*, 4 Camp. 368; *Parry v. Duncan*, 7 Bing. 243; *Thornton v. Adams*, 5 Mau. & Sel. 38.

Goods distrained, how dealt with.

The landlord having now seized and got the goods into his possession, we will next consider what he can do with them in order to make them available for the payment of his rent.

At common law a landlord who had taken goods by distress, only held them as a pledge until the rent was paid. In the meantime it was his duty to keep them safely.

Where a person distrains any thing that hath life, such as cattle, he must, as laid down by Lord Coke, impound them in a lawful pound within three miles in the same county, and that is either *overt or open*, in a pinfold made for such purposes, or in his own close, or in that of another by his consent (Co. Litt. 47 b; and see 1 & 2 P. & M. c. 12). And it is called open, because the owner may give his cattle meat and drink without trespass to any other, and then the cattle must be sustained at the peril of the owner (Co. Litt. 47 b; Bac. Abr. "Distress" (D)); but now the person who impounds animals must supply them with sufficient food and nourishment, and he has power to recover not exceeding double the value thereof

(17 & 18 Vict. c. 60, s. 1; and see 5 & 6 Will. 4, c. 59, s. 6; 12 & 13 Vict. c. 92, ss. 5, 6; see also *Mason v. Newland*, 9 C. & P. 575; and *Layton v. Hurry*, 8 Q. B. 811). If, however, the cattle were impounded in a pound *covert* or *close*, as in some part of the house of the person who took them, then he was bound to sustain them with food and drink at his own peril without having any satisfaction therefor. Co. Litt. 47 b.

A person who distrains cattle is bound to impound them in a *proper* pound, and if the usual pound be in an improper state, he must find another. *Bignell v. Clarke*, 5 H. & N. 485; *Wilder v. Speer*, 8 Ad. & Ell. 547.

Where the distress consists of such things as household utensils, which are liable to take harm by wet or weather, or be stolen if exposed, he must impound them in a house or other pound *covert*, within three miles in the same county, for if he impound them in pound *overt*, he will be answerable for them. Co. Litt. 47 b.

It has, however, been enacted, by 11 Geo. 2, c. 19, s. 10, "that in cases of distress for rent, the person distraining may impound, or otherwise secure the distress, on such part of the premises as shall be most convenient."

It seems that a distress is sufficiently impounded, in accordance with stat. 11 Geo. 2, c. 19, s. 10, where, with the consent of the tenant, the person distraining makes an inventory of part of the goods distrained, serves it, together with notice of the distress, on the tenant, and leaves a man in possession on the

premises, but does not disturb, lock up, or remove any of the goods. *Johnson v. Upham*, 2 Ell. & Ell. 250.

It may be here mentioned that tender upon the land before the distress makes the distress tortious (*Six Carpenters' case*, 8 Rep. 146), tender after the distress, and before the impounding, makes the detainer and not the taking wrongful (Ib.); but tender after the impounding makes neither one nor the other wrongful, for then it comes too late (Ib.). As to what is a sufficient impounding to make a tender too late, see *Firth v. Purvis*, 5 T. R. 432; *Browne v. Powell*, 4 Bing. 230; *Thomas v. Harries*, 1 M. & G. 695; *Ellis v. Taylor*, 8 M. & W. 415; *Pepperçorn v. Hofman*, 9 M. & W. 618.

Where growing crops are distrained, they must be impounded, after having been harvested by being laid up in barns, or other proper places on the premises, or if there be none on the premises, then in any other barn or proper place as near as may be to the premises. 11 Geo. 2, c. 19, s. 8.

If a distrainer takes the distress out of the place where it was originally impounded, for the purpose of making an unlawful use of it, the owner may interfere and take it out of his possession without rendering himself liable either for a rescue or a pound breach. *Smith v. Wright*, 6 H. & N. 821.

Assuming that the goods are properly impounded by the landlord, although, as we have seen at common law, they would be merely a pledge to be detained until the rent was paid, the legislature has given

additional power to the landlord to enable him to sell them, and thence obtain satisfaction. The statute 2 Will. & Mary, sess. 1, c. 5, s. 2, by which this power was conferred on the landlord, enacts, "that where any goods or chattels shall be distrained for rent reserved and due upon any demise, lease or contract whatsoever, and the tenant or owner of the goods so distrained shall not within *five days* next after such distress taken, and *notice* thereof (with the cause of such taking) left at the chief mansion-house, or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff according to law, that then in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish or place where such distress shall be taken (who are hereby required to be aiding and assisting therein), cause the goods and chattels so distrained to be appraised by two sworn appraisers (whom such sheriff, under-sheriff or constable are hereby empowered to swear) to appraise the same truly, according to the best of their understandings, and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the *best price* that can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, ap-

praisement and sale, leaving the overplus (if any) in the hands of the said sheriff, under-sheriff or constable for the owner's use."

However, by 35 & 36 Vict. c. 92, s. 13, so much of statute 2 Will. & Mary, c. 5, as requires any sheriff or under-sheriff or constable to be aiding and assisting at any distress for rent, or to swear any appraiser thereat, is repealed from the 24th of March, 1873 (except as to matters then arisen or pending), and no oath after the day aforesaid is to be required from such appraiser.

Goods, also, which having been fraudulently or clandestinely removed, and taken in distress out of the premises, can be sold. 11 Geo. 2, c. 19, s. 8.

As the landlord must, according to 2 Will. & Mary, c. 5, s. 2, sell goods distrained for "the best price that can be gotten for the same," it has been held that he cannot sell hay and unthreshed corn distrained for rent, under a condition (though in accordance with a covenant on the part of the tenant) that they should be consumed on the premises. See *Hawkins v. Walrond*, 1 C. P. D. 280; *Ridgway v. Lord Stafford*, 6 Ex. 904; 20 L. J. (Ex.) 226, overruling *Abbey v. Petch*, 8 M. & W. 419.

With regard to appraisement, it seems that notwithstanding 57 Geo. 3, c. 93, *two* sworn appraisers are requisite, unless the distress be under 20*l.*; see *Fletcher v. Saunders*, 1 M. & Rob. 375; *Bishop v. Byrant*, 6 C. & P. 484; *Allen v. Flicker*, 10 Ad. & Ell. 640; as to the swearing, see *Avenell v. Croker*, Moo. & Malk. 172; *Kenney v. May*, 1 M. & Rob. 56. It is not necessary to have

professional appraisers, provided they be fit persons (*Roden v. Eyton*, 6 C. B. 427); but a person making the distress cannot appraise it. *Westwood v. Cowne*, 1 Stark. 172; *Lyon v. Weldon*, 2 Bing. 336.

The five days mentioned in the act must be calculated *exclusively* of the day of taking the distress, and *inclusively* of the day of sale. See *Robinson v. Waddington*, 13 Q. B. 753; overruling *Wallace v. King*, 1 H. Black. 13.

And it seems that upon the equity of 2 Will. & Mary, sess. 1, c. 3, s. 2, a tender by the tenant of the rent due, and costs, to the person distraining, within five days after the distress is taken and before sale, though after the distress has been impounded in accordance with stat. 11 Geo. 2, c. 19, s. 10, is a good tender. *Johnson v. Upham*, 2 Ell. & Ell. 250, overruling *Ellis v. Taylor*, 8 M. & W. 415.

Where there is no sale of goods distrained, as, for instance, where the landlord takes them and gives them away to a third person, the property in them will not pass. See *King v. England*, 4 Best & Sm. 782.

In case of the bankruptcy of the tenant the landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy, it shall be available only for one year's rent accrued due prior to the

date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the overplus due, for which the distress may not have been available. 32 & 33 Vict. c. 71, s. 34.

When any rent or other payment falls due at stated periods, and the order of adjudication is made at any time other than one of such periods, the person entitled to such rent or payment may prove for a proportionate part thereof up to the day of the adjudication, as if such rent or payment grew due from day to day. *Ib.* s. 35.

The words "other person to whom any rent is due," in sect. 34, apply to a case when the rent is payable in respect of a tenancy, though the person entitled to the rent is not, in popular language, a landlord; as, for instance, in such a case as that of a receiver appointed under a mortgagee's receivership deed (*Jolly v. Arbuthnot*, 4 De G. & J. 224; *Ex parte Hill, In re Roberts*, 6 Ch. D. 63, 69). It does not ordinarily apply to a gas company having power to levy a distress under a special act (*Ex parte Hill, In re Roberts*, 6 Ch. D. 63), unless perhaps where the special act authorizes the company to recover rent and charges due to them "by the same means as landlords may recover rent in arrear." *Ex parte Birmingham and Staffordshire Gas Light Company, In re Fanshawe and Yorston*, 11 L. R., Eq. 615.

The trustee in bankruptcy has power to disclaim a lease, and so get rid of his liability in respect

thereof (sect. 23). If, however, he continues in possession of premises of which the debtor was tenant, not having disclaimed the lease, the landlord has a right, as against the trustee, to distrain, without obtaining any leave from the court, for rent accrued due after the commencement of the liquidation, even though it be rent which, under the terms of the lease, is payable in advance. *Ex parte Hale, In re Binns*, 1 Ch. D. 285.

After an order has been made for the winding-up of a company under the Companies Act, 1862 (25 & 26 Vict. c. 89), under the 163rd section of that act, any distress put in by the landlord upon the premises of the company being wound up will be void except it be put in with the leave of the court, and subject to such terms as the court may impose. Sect. 87.

The 10th section, moreover, of the Judicature Act, 1875 (38 & 39 Vict. c. 77) does not assimilate the rules in the winding-up of companies to the rules in bankruptcy, to the extent of giving the landlord of property of which a company in liquidation are tenants, a right to distrain for rent due *before* the winding-up order. *In re Coal Consumers Association*, 4 Ch. D. 625; *In re North Yorkshire Iron Company*, 7 Ch. D. 661.

Leave will not be given by the court to distrain for rent accrued due *before* the winding-up (*In re Traders' North Staffordshire Carrying Company*, 19 L. R., Eq. 60; *In re Coal Consumers Association*, 4 Ch. D. 625); as to such rent the creditor must prove in the winding-

up. *In re North Yorkshire Iron Company*, 7 Ch. D. 669.

In the case, however, of rent accrued due *after* the winding-up, leave may be given by the court, under sect. 87 of the Companies Act, 1862, for the landlord to distrain against the company. This has been well explained by Malins, V. C., in a recent case. See *In re Coal Consumers Association*, 4 Ch. D. 628; see also *In re North Yorkshire Iron Company*, 7 Ch. D. 651; *In re Lundy Granite Company*, 6 L. R., Ch. App. 466.

But where a distress was put in by the landlord upon lands demised to a joint stock company, after the presentation of a winding-up petition, but before any order was made, it was held by the Lords Justices that the distress might proceed, as there was nothing in the act rendering it incumbent upon the court to say, when a distress had been put in force before the making of the winding-up order, that the company was thus being wound up within the meaning of the 163rd section. *In re The Exhall Coal Mining Company, Limited*, 4 De G. & Jo. 377.

Where, moreover, the landlord is a stranger, but is not a creditor of the company, and where he seizes the goods under his ordinary rights of landlord, as being a stranger's goods on the land of his tenant, the 163rd section of the Companies Act, 1862, does not apply (*In re Traders' North Staffordshire Carrying Company*, 19 L. R., Eq. 60, 66; *In re Lundy Granite Company*, 6 L. R., Ch. App. 642); otherwise this act, which was passed for the purpose of producing equality, would have

produced inequality, by depriving the landlord of his legal right to a distress, and giving him nothing at all. *In re Traders' North Staffordshire Carrying Company*, 19 L. R., Eq. 66.

When a landlord distrains for rent and does not sell the goods, he cannot bring an action for the rent so long as he holds the distress, though it be insufficient to satisfy the rent. *Lehain v. Philpott*, 10 L. R., Ex. 242.

Upon the decease of the tenant, money due for rent in respect of land demised, whether by deed or parol, is equal in degree to a specialty debt (*Thompson v. Thompson*, 9 Price, 464, 471); but as the right to treat rent as a specialty debt is incident to privity of estate and not to privity of contract, it will not apply to the case of rent due for lands out of England. *Vincent v. Godson*, 4 De Gex, Mac. & G. 546.

It may be here mentioned that the Court of Chancery had no jurisdiction at the suit of the owner of property, to restrain a mere stranger from vexatiously distraining on or otherwise molesting the tenants. *Best v. Drake*, 11 Hare, 369.

With regard to this question when and how far the grantee of a rent-charge may proceed against the estate of the grantor for arrears, see *Monypenny v. Monypenny*, 9 H. L. Ca. 114.

Notwithstanding the existing legal remedies, courts of equity, at any rate when those legal remedies cannot be efficiently enforced for the recovery of the arrears of a rent-charge, will decree the arrears to be raised by sale or mortgage.

(*Cypit v. Jackson*, 13 Price, 721; *White v. Smale*, 22 Beav. 72; *White v. James*, 26 Beav. 191; *Hall v. Hurt*, 2 J. & H. 76; *Horton v. Hall*, 17 L. R., Eq. 437. See vide *Graves v. Hicks*, 11 Sim. 551.) Secus, where the lands charged are in strict settlement. *Taylor v. Taylor*, 17 L. R., Eq. 324.

VI. Remedies against wrongful Proceedings to obtain Payment of Rents.

According to the common law, although a landlord had in any particular case a right to distrain, yet if he abused his authority to distrain, he became a trespasser ab initio. *Six Carpenters' Case*, 8 Co. 146; 2 Smith's L. C. 65.

But by statute 11 Geo. 2, c. 19, if rent were justly due, any irregularity in the distress will not make the landlord a trespasser ab initio, though the tenant may recover satisfaction in an action, sect. 19; unless the landlord make tender of amends before the action brought, sect. 20.

Where a mere stranger distrains, the tenant might have brought either an action of trespass or trover, by which he might have obtained damages for the seizure of his goods; and now, under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), courts of common law have power to compel the specific delivery up of chattels. He may also proceed by the action of replevin.

The tenant has the same remedies against his landlord in case of an improper distress. If no rent was due at the time of the distress, the landlord is liable in an action on the

case to pay double the value of the goods distrained. 2 Will. & Mary, sess. 1, c. 5, s. 5.

But in order to support an action under the statute, the goods must have been actually sold. *Salter v. Brunsden*, 4 Mod. 231.

An action also lies against the landlord where he takes goods under a distress which he ought not to do, as where he takes tools of trade not in use, where there are other goods on the premises sufficient to satisfy the distress. *Nargatt v. Nias*, 28 L. J., Q. B. 143; see also *Harvey v. Pocock*, 11 M. & W. 740.

And in a recent case where sheep were sold under a distress for rent, when there were other goods which might have been distrained for the same rent, it was held that the owner of the sheep was entitled to recover from the distrainer, not merely nominal damages, but the full value of the sheep so seized. *Keen v. Priest*, 4 H. & N. 236. So in an anonymous case, cited by Watson, B., 4 Hurlst. & N. 240, on the Northern Circuit, in an action for distraining a tenant's goods before sunrise, Cresswell, J., directed the jury that the plaintiff was entitled to the full value of the goods taken.

Where a distress is illegal *ab initio*, the measure of damages that the tenant will be entitled to recover will be the full value of the goods, and not that value minus the sum due for rent. See *Attack v. Bramwell*, 3 Best & Sm. 520, where the landlord, in order to make a distress, had entered on the plaintiff's premises by forcibly breaking in a window, and seized and sold his

goods. *Masters v. Farris*, 1 C. B. 715.

The action of replevin is the one usually adopted by the tenant, inasmuch as he can thereby recover the goods at once until the question is decided whether the landlord has the right to distrain or not. This action formerly commenced by plaintiff in the Sheriff's Court, under the Statute of Marlebridge (52 Hen. 3, c. 21); and, upon the defendant's avowry of his right to seize the goods, the sheriff, while the title was in dispute, replevied, that is to say, restored the goods to the tenant upon his giving as security (stat. Westminster 2; 13 Edw. 1, c. 2) his own bond with two responsible sureties in double the value of the goods distrained, to prosecute the suit with effect and without delay (11 Geo. 2, c. 19, s. 23); and unless the sureties are apparently responsible (*Hindle v. Blades*, 5 Taunt. 225), the sheriff will be liable for a due want of discretion, if they are insufficient. *Jeffery v. Bastard*, 4 Ad. & Ell. 823; *Plumer v. Brisco*, 11 Q. B. 46.

Formerly, the sheriff, upon the application of the owner and the execution of a replevin bond, took the goods from the distrainer and redelivered them to the owner; but now, by 19 & 20 Vict. c. 108, these powers are transferred to the registrar of the county court of the district in which the distress is taken, and to the high bailiff (ss. 63—66, 71; and see 9 & 10 Vict. c. 95, ss. 119, 120). By sects. 65 and 66 of 19 & 20 Vict. c. 108, the replevin may be commenced in any superior court in the form applicable

to personal actions therein, upon such security being given to the registrar as therein mentioned, provided a question of title is involved, or the rent exceeds 20*l*. See Smith & Soden, Land. & Ten. 173, 2nd ed. Even where there is a question of title or the damage exceeds 20*l*., the action may be brought in the county court, subject to a removal by the defendants under sect. 67. *Ib*.

If the tenant be successful in the action of replevin, he recovers damages; if the landlord be so, he recovers the arrears and costs. 17 Car. 2, c. 7.

As to the action of replevin, see Bac. Abr. "Replevin and Avowry;" Selwyn's N. P. Replevin; notes to *Mounson v. Redshaw*, 1 Wms. Saund. 193; 19 & 20 Vict. c. 108; 23 & 24 Vict. c. 126, ss. 22, 23, 24.

See more fully as to the remedies for wrongful or illegal distress, Woodfall, L. & T. 454, 11th ed.; Smith & Soden, Land. & Ten. 167, 2nd ed.

VII. *The Extinguishment and Suspension of Rents.*

A rent may be extinguished in various ways, either by the express or implied contract of the parties or by the operation of law.

The tenancy may be dissolved by mutual consent, as, for instance, by a surrender of the lease, in which case the rent would be extinguished from the time fixed upon by the contract. So, if the owner of a rent-charge released the *whole* of the land from such rent-charge, it is obvious that the rent will be extinguished.

Where there is unity of owner-

ship of the rent and the land out of which it issues, the rent will be extinguished. See Bro. Abr. tit. "Extinguishment and Suspension," pl. 18, 28. Thus an absolute purchase of the tenancy by the lord will be an extinguishment of the rent (*Gilbert on Rents*, 149); but if the purchase was upon condition, or was only of a particular estate of shorter duration than that which the landlord had in the rent-service, in these cases, though there be an union of the tenancy and the rent in the same hand, yet, because that union is but temporary, the rent will not be extinguished but only suspended. *Ib*. 150; and see *Dixon v. Harrison*, Vaugh. 39; *Hodgkins v. Thornborough*, Pollexf. 142.

It might be naturally supposed, that whenever a person entitled to a rent purchased only *part* of the land from which it issued, that, in the case of every kind of rent, an apportionment would take place. This, however, is not so, inasmuch as there is a most important difference between the effect of the purchase of *part* of the land, in the case of a *rent-service* and *rent-charge*.

If a person had a *rent-service* to him and his heirs, issuing out of certain land, and he purchase part of the land, the rent would only be extinguished as to the parcel of the land purchased, and there would be an apportionment of the rent, according to the value of the land (*Gilbert on Rents*, 151); except where the *rent-service* was not susceptible of apportionment, as if it were to render yearly to the lord at a particular time a horse or the like (*Litt. s. 222*). Where, however,

the entire service was for the benefit of the public, as, for instance, to repair a bridge or way, or to keep a beacon, or if it were for the advancement of justice, or a work of piety, the tenant would still be chargeable with the whole services. Co. Litt. 149 a.

If, however, a person had a *rent-charge* to him and his heirs, issuing out of certain land, and he purchase *part* of the land in fee, the rent-charge would be extinguished (Litt. s. 222). A reason by no means satisfactory is given for this by Lord Coke; "the rent," he observes, "is entire, and against common right, and issuing out of every part of the land, and therefore by purchase of part, it is extinct in the whole, and cannot be apportioned." Co. Litt. 147 b.

Where a person had a *rent-charge* out of land, and released part of such land from the rent, under the old law the whole rent would be extinguished, because it issued out of the whole of the land; but he might release part of the rent-charge, without extinguishing the whole, because it is said, "the grantee deals only with that which is his own, namely, the rent and not the land." Vin. Abr. "Rent," 504; 3 Cruise, Dig. 301; Co. Litt. 148.

Again, where a *part* of the land out of which a rent-charge issued was devised to the grantee, the rent-charge would be extinguished, although the devise be made over and above the rent-charge. *Dennett v. Pass*, 1 Bing. N. C. 388.

Where, however, part of the hereditaments charged with the rent-

charge *descended* upon the grantee, because it came to him not by his own act, but by operation of law, an apportionment of the rent would take place. Litt. s. 224.

The doctrine as to the extinguishment of a rent-charge caused great difficulty where one had a rent-charge, and it was wished to discharge part of the land from the payment; in order to enable a sale or mortgage of such parts, one mode practised of preserving the rent-charge in other parts was agreeing that the rent-charge should not be prejudiced in such other parts, but should be wholly payable thereout. But this was rather a new grant of the rent-charge by implication, than a preservation of the old rent-charge. Another mode sometimes adopted was having a covenant from the owner of the rent-charge, not to claim the rent-charge out of the land intended to be exonerated. But, even this mode was not quite free from exception; for according to some books such a covenant amounts to a release. Co. Litt. 147 b, n.; see *Butler v. Monnings*, Noy, 5; *Deux v. Jeffreys*, Cro. Eliz. 352; Shep. Touch. by Prest. 345; *Walmesley v. Cooper*, 11 Ad. & Ell. 216.

The interference of the legislature was much needed to put an end to such a state of the law, founded upon artificial reasoning, and attended with inconvenient results, and it has been enacted that "the release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any

part of the rent-charge out of the hereditaments released, without prejudice nevertheless to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release." 22 & 23 Vict. c. 35, s. 10.

As the landlord in the absence of any express contract, is bound to maintain the tenant in the enjoyment of land demised, as against all persons claiming under him, or paramount to him, it follows that if the tenant be evicted from the premises by the landlord, or any person claiming *under* him, or if they be recovered by any person claiming *paramount* to him, the tenant will be discharged from payment of the rent from the time of such eviction or recovery, but not of that previously due. 2 Roll. Abr. 429; Co. Litt. 201 b, 148 b; Gilb. on Rents, 146; *Boodle v. Campbell*, 7 Mann. & Gr. 386; *Selby v. Browne*, 7 Q. B. 620.

A mere trespass, however, by the landlord, 1 Wms. Saund. 205, n.(2), or eviction by a stranger, will be no answer to a demand of rent by the landlord. See *Paradine v. Jane*, Alleyne, 26; where the tenant pleaded that he had been evicted by Prince Rupert, who had invaded the realm with a hostile army, entered upon the defendant's possession and expelled him, so that he could not take the profits; it was however held, that the plea was insufficient.

An eviction by the landlord from a *part* of the premises creates a suspension of the entire rent during the continuance of the eviction,

until the tenant re-enters and resumes possession (1 Wms. Saund. 204, and authorities there cited). The tenancy, however, will not be thereby put an end to, nor will the tenant be discharged from the performance of his covenants, other than the covenant for payment of rent. *Morrison v. Chadwick*, 7 C. B. 266, 283. See also *Newton v. Allin*, 1 Q. B. 518.

If a person recover *part* of the premises by a title paramount to that of the landlord, the rent will be apportioned. 1 Roll. Abr. "Apportionment," B.; *Stevenson v. Lambard*, 2 East, 575.

Where, however, a lessee has never been able to obtain possession of *part* of the demised premises, in consequence of a paramount title in another person, the demise will be void, and the landlord will not be able to distrain for any part of the rent. See *Neale v. Mackenzie*, 1 Mees. & W. 747; *S. C.* 2 Cr., M. & R. 84; *Doe d. Griffiths v. Lloyd*, 3 Esp. 78.

It may be here mentioned that a landlord may by express contract either extend (*Nash v. Palmer*, 5 Mau. & Sel. 374; *Fowle v. Welsh*, 1 B. & C. 29; *Lewis v. Smith*, 9 C. B. 610) or limit (*Merritt v. Frame*, 4 Taunt. 329; *Stanley v. Hayes*, 3 Q. B. 105) his liability to protect his tenant against evictions.

Although the buildings upon the premises may have been burnt down, and they may have been thereby rendered useless to the tenant, he will nevertheless be compelled to pay the rent. *Pindar v. Ainsley*, cited 1 T. R. 312; *Baker v. Holtzaffell*, 4 Taunt. 45; *Leeds v.*

Cheetham, 1 Sim. 146; *Izon v. Gorton*, 5 Bing. N. C. 501; *Surplice v. Farnsworth*, 7 Mann. & Gr. 576; *Packer v. Gibbins*, 1 Q. B. 421.

It has been before stated that *rent-service* is incident to the reversion; where, therefore, the reversion was destroyed, as by merger in an ulterior remainder or reversion, the rent was extinguished. Thus where a person made a lease for 100 years, and the lessee made an underlease for twenty years, rendering rent with a clause of re-entry, and afterwards the original lessor granted the reversion in fee, and the *grantee purchased the reversion of the term*, it was held that the grantee should not have either the rent or the power of re-entry, for the reversion of the term to which they were incident was extinguished in the reversion in fee. And though this case was only determined at the assizes, yet it was afterwards recognized in the Court. *Threr v. Barton*, Moor, 94; and see *Webb v. Russell*, 3 T. R. 393, 403.

The same result followed where lessees of renewable leaseholds surrendered their leases for the purpose of obtaining renewals, and to prevent it they were obliged, on renewals, to obtain surrenders from their underlessees. This, however, was rendered unnecessary by 4 Geo. 2, c. 29, s. 6; and 8 & 9 Vict. c. 106, s. 9, enacts, "that when the reversion expectant on a lease, made either before or after the passing of this act, of any tenements or hereditaments, of any tenure, shall, after the 1st October, 1845, be surrendered or merge; the estate which

shall for the time being confer as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease."

Upon the death of a person entitled to the fee-simple of a rent-charge intestate and without heirs it will not escheat but sink into the land from which it issues. Bro. Abr. tit. "Extinguishment and Suspension," pl. 2.

Rent payable out of land is extinguished by its non-payment for twenty years (reduced to twelve years by 37 & 38 Vict. c. 57, coming into operation on the 1st of January, 1879), and time runs from the last actual receipt. See 3 & 4 Will. 4, c. 27, s. 2; *Owen v. De Beauvoir*, 16 Mees. & W. 547; *De Beauvoir v. Owen*, 5 Exch. 166; *Lord Chichester v. Hall*, 17 L. T. 121, Q. B.

Where the owner of a fee-farm rent continues to receive it from the vendors of land out of which it is payable, and their successors, instead of from the purchaser, without being aware of the sale of the land, his title to the rent will not be barred by discontinuance of the receipt of the rent; first, because he has actually received it, and secondly, because it would be presumed, after payment of the rent for a long period by the vendor and his successors, that it was made under some arrangement at the

time of the purchase. *Adnam v. The Earl of Sandwich*, 2 Q. B. D. 485.

The limitation, moreover, prescribed by the 3 & 4 Will. 4, c. 27, does not apply to an action on a collateral covenant for payment of a rent charged on land, and the covenantee may recover damages for the breach of that covenant, notwithstanding his right to recover the rent-charge is barred by the above statute. *Manning v. Phelps*, 10 Exch. 59; and see *Strachan v. Thomas*, *Sims v. Thomas*, 12 Ad. & Ell. 536; 3 Dru. & W. 492.

Nor is it applicable to heriots,

that is to say, the right to take a specific chattel either upon death or alienation in a manor notwithstanding the interpretation of rent in sect. 1; for to apply to such a subject words in the statute which are applicable only to continuous payments would be to disregard the principle and spirit of the statute; and to apply such words to a case in which no opportunity may occur for enforcing the right for perhaps twenty, thirty, or forty years, would seem to be a total departure from the intention of the legislature. *Lord Zouche v. Dalbiac*, 10 L. R., Ex. 172, 177, 178.

TYRRELL'S CASE (*a*).

In Cur. Ward. Mich. Term, 4 & 5 Phil. and Mary.

[REPORTED DYER, 155 a.]

USE UPON A USE.]—*A woman, by bargain and sale enrolled, granted to her son A. all her manors, lands, &c., habendum to the said A. and his heirs for ever, to the use of herself for life, and after her decease to the use of A., and the heirs of his body lawfully begotten; and for default of such issue to the use of her own right heirs:—Held, that the use being executed in A. by the statute, the uses in the habendum were void. There cannot be a use upon a use.*

JANE TYRRELL, vidua, pur le somme de 400*l.* paies per G. Tyrrell sa fils et heire apparant (*b*), per indenture inrolle in le Chauncery anno 4 Ed. 6, bargain, vende, done, graunt, covenant, et conclude, al dit G. Tyrrell tous ses mannors, terres, tenements, &c. A aver et tener les dites, &c. (*c*) al dit G. T. et a ces heires a toutes jours, al use del dit Jane durant sa vie saunx impeachment de wast, et immediate apres sa decesse al use del dit G. T. et de les heires de son corps loialment engendres (*d*). Et pur default de tiel issue, al use de les heires del dit Jane a toutes jours. Quære bien si le lymitation de ceux uses sur le habendum ne soyt voyde, et impertinent, eo que un use ne poyt estre treat, ou reserve hors d'un use, come semble primâ facie (*e*). Et icy il covient destre primes un use transferre al vendée, devaunt que ascun franktenement ou inheritance in le terre poyt estre vest in luy per l'enrolement, &c. Et cest cas ad estre in doubt in le Common place devant cest temps. Ideo quære legem (*f*), mes semble a toutes les Justices del Common Bench, et

(*a*) Gilb. Uses and Trusts by Sugd. n. (1).

(*b*) Limitation de uses in 'cur' ward' et liberationum; 1 Anders. 3, 7; Bendl. 28; Coke, 137 a.

(*c*) Uses void per 27 H. 8; Dyer, 114, 118, 146, 312.

(*d*) B. N. C. 60, 284.

(*e*) 7 Eliz. 2, 3, 5 a; 1 Co. 137.

(*f*) Crompton's Courts, 53 a, 54 a.

a Saunders Chief Justice, que le limitation des uses supra est void, &c. Car admit que le statute d'enrolments ne ust estre faits, mes tantum le Statute de Uses in 27 H. 8 (g), donques le cas supra ne poit estre, eo que use ne poit estre ingendre de use, &c. Vide M. 10 & 11 El. fol.

In the case of *Dillon v. Freine* (better known as *Chudleigh's Case*) (omitted from this edition on account of its length), the law of uses and trusts, both before and after the Statute of Uses (27 Hen. 8, c. 10), was very fully discussed, and some important points settled. It is, however, chiefly valuable for the historical account of the events which led to, the policy which dictated, and the arts which eventually defeated the objects of, that statute. Bacon's Law Tracts, 299.

Tyrrell's Case, retained as a leading case at the head of this Note, shows how the object of the Statute of Uses was overthrown by the decision of the Judges, that there *cannot be a use upon a use*, since by adding a few words to a conveyance everything could be effected which the statute was intended to prevent.

It is proposed in this Note to consider the law of uses and trusts; first, as it existed before, and, secondly, subsequent to, the Statute of Uses (27 Hen. 8, c. 10).

I. *Uses and Trusts before the Statute 27 Hen. 8, c. 10.*

In early feudal times the transfer of lands was attended by great no-

toriety, since by common law they would only pass by solemn livery or matter of record, or by sufficient writing if they lay in *grant*. See preamble to stat. 27 Hen. 8, c. 10. The object of this notoriety was that the lord might always know to whom he might apply for the services due from the tenant, and for the profits arising from such incidents of tenure, as aids, reliefs, wardships, descents or forfeitures. To prevent also the loss of the fruits of tenure, the clergy were not allowed to hold lands in mortmain. See Statute de Religiosis, 7 Edw. 1, stat. 2.

The ingenuity, however, of the clergy, and the necessity of the times, invented what are termed *Uses*; that is to say, beneficial interests in the land distinct from the legal ownership, and dependent at first merely upon the good faith and conscience of the legal owner. Thus, if A. made a feoffment to a feoffee, to the use of himself, the feoffee was to all intents the *legal* owner of the lands, and A. was the equitable or beneficial owner; that is to say, the feoffee was liable to all feudal duties and incidents, such as wardships, reliefs and escheats, and the lands were forfeitable for his trea-

(g) Cap. 16; Rast. Inrolments, 2; Carth. 272, 273.

son or felony. So likewise they descended to his heirs, and his wife was entitled to dower thereout, and he might exercise legal ownership, both by bringing actions at law in respect of such lands and otherwise. See Butl. Co. Litt. 271 b; Bro. Feoff. al Us. pl. 10; Dy. 9 b; Jenk. 190.

As, however, it would have been against good conscience for the feoffee to arrogate to himself the beneficial ownership, the Court of Chancery, by means of the subpœna, enabled the feoffor, or cestui que use to enforce his right to receive the rents and profits, and also compelled the feoffee to convey as the cestui que use should direct, or, upon cestui que use being disturbed, to re-enter or bring an action to recover the possession.

With regard to the use or beneficial interest, Courts of Equity, following in this respect the common law, whether the land was freehold, copyhold, gavelkind, or borough-English, allowed it to descend in the same mode to the heirs of the cestui que use as it would have done had he been seised of the legal estate. Sand. Uses, 64.

The use, however, did not attach itself to the land, but to the conscience of the legal owner. Following the definition of Lord Coke, in *Chudleigh's Case*, the use may well be described as "a trust or confidence which is not issuing out of land, but as a thing collateral annexed in privity to the estate and to the person touching the land; scil. that cestui que use shall take the profits, and that the *ter-tenant* [i. e. the feoffee] shall make estates

T.L.C.

according to his direction. So that he who hath an use hath not *jus neque in re, neque in rem*, but only a confidence and trust, for which he hath no remedy by the common law, but his remedy was only by subpœna in Chancery. If the feoffees would not perform the order of the Chancery, then their persons, for the breach of the confidence, were to be imprisoned till they did perform it." 1 Co. 121 b.

The invention of uses, according to Coke, was attributable to fraud and fear; fear, in times of trouble and civil wars, to save inheritances from being forfeited; and fraud, to defeat due debts, lawful actions, wards, escheats, mortmains, &c. Ib.

The doctrine of uses also gave persons a power which they had not previously, of in effect devising real property; for instance, lands might be conveyed to feoffees, to such uses as the feoffor might declare; and, by declaring the uses (which would be enforced in equity), he could regulate the disposition of the land after his death. 1 Sand. Uses, 18.

Again, at common law, estates could only be limited in possession or by way of remainder; according to which, upon the natural determination of the prior estate, the succeeding use must, if at all, instantly take effect (but see now 8 & 9 Vict. c. 106, s. 8, repealing 7 & 8 Vict. c. 76, s. 8, to the same effect; and 40 & 41 Vict. c. 33). By means of uses, however, an estate might be made to take effect in derogation of the former estate, without awaiting its natural determination. These were termed shifting or springing uses. Moreover, other estates, equally

Z

unknown to the simplicity of the common law, might, as we shall see more fully hereafter, be created by the intervention of uses.

What was essential in order to raise a Use before the Statute 27 Hen. 8, c. 10.

There were certain things essential in raising a use:—First. That there should be a person or persons capable of standing seised to a use. In general, any person, even a feme covert or an infant (Sand. Uses, 56), save when they had only a limited interest, such as an estate for life, in tail, for years, or by occupancy (Ib. 59), might stand seised to a use. But the king or queen, a corporation, abbé, mayor, commonalty, or persons attainted, could not be feoffees to uses. Ib. 59.

Moreover, in order that a person could stand seised to uses, it was necessary that there should be, as laid down in *Chudleigh's Case*, 1 Co. 121 b, privity in the estate and confidence in the person. For instance, from want of *privity* of estate, a lord by escheat, or the tenant in dower or curtesy of a feoffee, or a disseisor, abator, or intruder of the feoffee, could not stand seised to a use, as they are not, to use the words of Coke, in the *per*, that is to say, *under* the feoffment, but are in in the *post*, that is to say, by a title either paramount or extraneous to that of the feoffor. Butl. Co. Litt. 272 a, II.

There must also have been *confidence* in the person to raise the use as well as privity of the estate. Thus in the case put by Coke, "If the feoffee to an use upon good con-

sideration enfeoffed another who had no notice, here is privity in estate, but here is no confidence in the person either expressed or implied, and therefore the use is gone; but if a feoffment be made without consideration to one who hath no notice, there is privity in estate, and the law implies notice, and therefore the use remains, but not to a thing annexed to the land, but to the privity of the estate. 5 E. 4, 7 b." 1 Co. 122 b, where many other examples are given. And see Sand. Uses, 58.

Secondly. There must have been a person capable of receiving or taking a use, and it seems that any person to whom a conveyance of lands might be made might take a use. A use might be declared in favour of the king by matter of record (Sand. Uses, 60); and (if a licence were obtained) in favour of a corporation (Shep. T. 509); but (although there seems to have been some doubt upon the subject) not in favour of an alien (Sand. Uses, 61). Since, however, the passing of the Naturalization Act, 1870 (33 Vict. c. 14), an alien may take, acquire, hold, and dispose of real and personal property of every description, in the same manner in all respects as a natural-born British subject.

Thirdly. There must have been either an express declaration of the use or a consideration whereby it might be raised. Where there was an express declaration of a use, it would be valid, although no consideration were paid (Sand. Uses, 61; 32 Vin. Abr. 247, pl. 1, n). If there were no declaration of use, and the grantee or feoffee paid a con-

sideration, a use would be thereby raised or implied for him. Sand. Uses, 61.

Where, however, there was no express declaration of use, nor consideration paid by the feoffee or grantee, there would be a resulting use for the grantor or feoffor, who would thereupon be in as of the old use (Ib.) Any consideration, however small, was sufficient to raise a use for the feoffee. Ib. 62, 63.

Fourthly. There must have been hereditaments out of which the use might arise, such as lands, reversions, remainders. But it could not be raised out of personal inheritances such as annuities (Sand. Uses, 63); nor out of mere rights, such as a right of common, or rights of way in gross (Ib. 64); nor out of a mere personal possession, such as a peerage. *The Buckhurst Peerage*, 2 App. Ca. 27.

Trusts before the Statute 27 Hen. 8, c. 10.

Trusts before the Statute of Uses were of two kinds, which differed from uses, inasmuch as, by the conveyance to the trustees, they not merely took a legal interest in the land, but also the right to take the profits, or to do certain acts, for the special purposes for which the trust was created. For instance, if there were a feoffment in trust or to the intent to convey to a third party, or to re-enfeoff the feoffor, or to be vouched, or to suffer a recovery; all these were cases of special trusts, where certain acts were to be done. Sand. Uses, 3; Hayes's Introd. 36, 4th ed.

There were also special trusts unlawful, as they were termed by Bacon, created "to the intent to defraud creditors, or to get men to maintain suits, or to defeat the tenancy to the præcipe, or the Statute of Mortmain, or lords of their wardships, or the like; and those were termed frauds, covins or collusions." Bacon, Uses, 8.

It might be supposed at first sight, when the feoffee was put in the place of the feoffor as the legal owner, that as he would be liable to all the incidents of tenure, no great injury would be done to the lord; but the mode of evading these burdens seems to have been, by making a feoffment to several persons, of whom the beneficial owner was usually one, so that upon the death of one, the estate would survive to the others, whose numbers being kept up as occasion might require by other feoffments, the lord would therefore lose the fruits of descents and wardships. Hayes's Introd. 43, 4th ed.

So feoffments might be made to powerful persons in such times above the law, or to persons either unknown or difficult to discover. In short, to use the words of a learned writer, "by the introduction of uses, as well the cardinal maxims of the feudal policy, as many of the subordinate rules of property, were virtually defeated. The clergy who were prohibited by law from purchasing land, but who could now take the profits to any extent, without becoming the legal owners of a single rood, increased their possessions. The factious baron vested his estate in a few confidential

friends, and committed treason with comparative safety. The peaceful proprietor, adopting the same precaution, enjoyed and disposed of the beneficial interest, unvexed by the exactions of the lord, and regardless of the rules of the common law." Hayes's *Intro.* 32, 4th ed.

Various statutes were passed for the purpose of remedying what were considered the mischiefs introduced by the doctrine of uses, by giving an action to the disseisee, against cestui que use when a fraudulent feoffment had been made to powerful or unknown persons, for the purpose of defeating his rights (1 Rich. 2, c. 9; 4 Hen. 4, c. 7; 11 Hen. 6, c. 3; 1 Hen. 7, c. 1), and 15 R. 2, c. 5, was passed to prevent religious houses or commonalties from acquiring lands by means of uses in fraud of *Magna Charta*, c. 6; and 7 E. 1, *De Religiosis* and other acts were passed to prevent lords losing, by means of uses, their wardships, reliefs, heriots, and other fruits of tenure. See 15 Rich. 2, c. 5; 4 Hen. 7, c. 17; 19 Hen. 7, c. 15.

Another important act, 1 Rich. 3, c. 1 (in effect repealed by 27 Hen. 8, c. 10, and since actually by Statute Law Revision Act, 1863, 26 & 27 Vict. c. 125), gave power to the cestui que use to alien his lands without the consent of the feoffees. The object of this statute was to prevent the litigation and uncertainty which arose from the dishonesty or perversity of feoffees; for as the feoffees were legal owners, they might alien or lease the land, and the purchaser or lessee, if for valuable consideration, and without

notice of the uses, would hold the estate free from them, and the only remedy of the cestui que use was against the feoffees. A mere volunteer, however, or a person having notice of the uses, would be bound by them. Again, the feoffees might refuse to join in any conveyance, or after the cestui que use had aliened, they might enter, and thereby give rise to several vexatious suits in Chancery. See *Chudleigh's Case*, 1 Co. 123 a.

The remedies afforded by these enactments were only partially successful, and accordingly the Statute of Uses, 27 Hen. 8, c. 10, was passed, the object of which evidently was, by uniting the legal seisin or interest to the equitable or beneficial interest, entirely to abolish the doctrine of uses and trusts. *Chudleigh's Case*, 1 Co. 124 a.

II. *Uses and Trusts after the Statute* 27 Hen. 8, c. 10.

Whatever may have been the intention of the legislature, it will be seen hereafter that the legal estate by the operation of the statute was endowed with most of the flexible properties of the use, and from the determination of the Courts of Law, of which *Tyrrell's Case*, is one of the earliest examples, that there could not be "a use upon a use," the equitable or beneficial interest might again be severed from the legal ownership. Page 345, post.

Uses after the Statute 27 Hen. 8, c. 10.

In order to show the effect of the statute of 27 Hen. 8, c. 10, upon which our modern system of con-

veyancing is mainly founded, it is proposed to consider,—First, The nature of uses since the statute of 27 Hen. 8, c. 10, and what is essential in order to raise them; Secondly, As to the effect of the operation of the statute in joining the seisin to the use, and how far limitations to uses agree with or differ from limitations at common law; Thirdly, What objects, either wholly unattainable or imperfectly attainable, at common law, became attainable by means of uses under the statute; Fourthly, As to powers deriving their operation from the Statute of Uses; Fifthly, As to the mode in which conveyances to uses operate; Sixthly, As to declarations of uses; Seventhly, How far the Statute of Uses is applicable to wills; Eighthly, As to uses not executed by the statute; and, Ninthly, It is proposed to make a few observations on trusts since the statute of 27 Hen. 8, c. 10.

1. *The Nature of Uses since the Statute 27 Hen. 8, c. 10, and what is essential in order to raise them.*

By the operation of the Statute of Uses in all cases where freeholds are the subject-matter of the conveyance (leaseholds and copyholds not being within the scope of the statute), the use is immediately joined to the possession, so as completely to consolidate them together. In order to raise a use certain circumstances are necessary, viz.—First, a person *seised* to the use or trust; because it is clear that the statute will execute a trust where it is used merely as a convertible term

for a use. Thus, if a feoffment be made to A. and his heirs, to the use of or in trust for B. and his heirs, B. has not, as before the statute, a mere equitable or beneficial interest, he becomes to all intents and purposes the legal as well as equitable owner.

So also if an estate be conveyed to A. and his heirs, to the use of B. for life, remainder to C. in fee, the statute divests A. of the whole legal estate, and vests it in B. for life, remainder to C. in fee.

The second requisite to raise a use is a *cestui que use* other than the person standing seised to the use, for if there were a conveyance to A. and his heirs, to the use of or in trust for A. and his heirs, A., as before the statute, would take both the legal and beneficial interest by the common law, and not by the statute (*Sammes's Case*, 13 Co. 56; *Altham v. Anglesey*, Gilb. Rep. 16, 17; *Long v. Buckeridge*, 1 Stra. 106; *Gwam v. Roe*, 1 Salk. 90; *Doe d. Lloyd v. Passingham*, 6 B. & C. 305; *Gorman v. Byrne*, 8 Ir. C. L. Rep., N. S. 394; *Peacock v. Eastland*, 10 L. R., Eq. 17). There is, however, an exception to the rule, where, the use to a person not being commensurate with his seisin, a further use is limited over to another person; as, for instance, if a conveyance were made to A. and his heirs, to the use of himself in tail, with remainder over to another, or to the use of B. for life, remainder to A. for life, remainder to C. in fee, or to the use of A. and a stranger, in these cases the use would be executed by the statute. Sand. Uses, 94—97.

Another requisite is a *use in esse*,

in possession, reversion or remainder, which may be either express or implied.

An express use may be raised not only by the words made use of in the statute, viz. "use," "trust" or "confidence," but by any words which show an intention to create a use. See Bac. Uses, 47; *Hammer-ton's Case*, Dyer, 166 a, n.; *Betnam v. Bateston*, Ib.; 4 Leon. 22; *Anon.*, 4 Leon. 2, pl. 3; *Boydell v. Wal-thall*, Moore, 722.

Implied or resulting uses, which, as we have seen, existed before the statute, have not been abolished by it.

Accordingly it has been laid down as a general rule, that if a conveyance be made *without any consideration or declaration of use*, the use will result to the party making the conveyance, and be executed in him by the statute (*Armstrong v. Wolsey*, 2 Wils. 19; Doug. 26; *Beck-with's Case*, 2 Co. 56, 58 b; Sand. Uses, 100); but it seems that a nominal consideration, as of 5s., would be sufficient to show the intention of the parties that there should be no resulting use. Sand. Uses, 104.

On the other hand, if there be only a partial declaration of a use, even although there be a valuable consideration given, so much of the use as is undisposed of results (*Wilkes v. Lewson*, Dy. 169; *Wilkins v. Perrat*, Moore, 876; *Piers v. Hoe*, Cro. Eliz. 131; 1 Leon. 125; Co. Litt. 23 a; *Woodliff v. Drury*, Cro. Eliz. 439; *Audley's Case*, Dy. 166 a). Thus, if a feoffment be made for valuable consideration by A. to B. in fee, to the use of B. for life, and no further

declaration be made, the remainder of the estate, after the life interest of B., results to A., and is executed by the statute. See Sand. Uses, 104. The ground for holding in such a case that there is a resulting use is this, that the express declaration of the use as to part shows the intention of the parties that the feoffor is to take the remainder of the use.

But if it appeared upon the face of the deed by a recital, for instance, that it was the intention of the feoffee to purchase the whole estate, there would be no resulting use to the feoffor, but to the party from whom the consideration moved. *Pelly v. Maddin*, 21 Vin. Abr. 498, pl. 15; Sand. Uses, 105.

Parol evidence may be used to rebut a resulting use. *Lamplugh v. Lamplugh*, 1 P. Wms. 112; *Roe v. Popham*, Dougl. 26.

Another requisite to the raising of uses is, that there must be, as a subject-matter, some *hereditaments in esse* (not being copyhold), either corporeal or incorporeal, in possession, reversion or remainder. Thus no use will arise by virtue of a covenant to stand seised of lands of which the covenantor may *afterwards* become the purchaser. *Yelverton v. Yelverton*, Cro. Eliz. 401; Moor, 342; 2 Roll. Abr. 790; Sand. Uses, 107.

As to what would be the effect of such a covenant in equity, see cases cited 2 L. C. in Eq. 777, 778, 5th ed.

A grant of a rent-charge *de novo* to uses may be made within the statute, the land being the seisin out of which it arises. Bac. Uses,

143; *Gilbertson v. Richards*, 4 H. & N. 277.

Where a rent-charge is created by means of a conveyance to uses, the grantee acquires "actual seisin" by the words of the statute 27 Hen. 8, c. 10, s. 1; and was therefore held under 2 & 3 Will. 4, c. 45, s. 26, entitled to be registered in respect thereof, notwithstanding he might not have actually received any part of the rent (*Heelis v. Blain*, 18 C. B., N. S. 90; *Hadfield's Case*, 8 L. R., C. P. 306). Secus, where the rent-charge is created by an ordinary grant at common law. *Murray v. Thorniley*, 2 C. B. 217; *Hayden v. The Overseers of Tiverton*, 4 C. B. 1; *Orme's Case*, 8 L. R., C. P. 281.

The Statute of Uses, after reciting, in the fourth section, that "where divers persons stand and be seised of and in any lands, tenements or hereditaments, in fee simple or otherwise, to the use and intent that some other person or persons shall have and perceive yearly to them, and to his or their heirs, one annual rent of 10*l.*, or more or less, out of the same lands and tenements, and some other person one other annual rent to him and his assigns, for term of life or years, or for some other special time, according to such intent and use as hath been heretofore declared, limited and made thereof." It is by the 5th section enacted "that in every such case, the same persons, their heirs and assigns, that have such use and interest, to have and perceive any such annual rents out of any lands, tenements or hereditaments, that they and every of them,

their heirs and assigns, be adjudged and deemed to be in possession and seisin of the same rent, of and in such like estate, as they had in the title, interest or use of the said rent or profit, and as if a sufficient grant or other lawful conveyance had been made and executed to them, by such as were and shall be seised to the use and intent of any such rent, to be had, made or paid, according to the very trust and intent thereof; and that all and every such person and persons as have, or hereafter shall have, any title, use and interest in or to any such rent or profit, shall lawfully distrain for nonpayment of the said rent; and in their own names make avowries, or by their bailiffs or servants make conisances and justifications, and have all other suits, entries and remedies for such rents, as if the same rents had been actually and really granted to them with sufficient clauses of distress, re-entry or otherwise, according to such conditions, pains, or other things limited and appointed upon the trust and intent for payment or surety of such rent."

Another requisite to the execution of a use by the statute is, that the feoffee or grantee have a *seisin* at the time of its creation commensurate with the use, for the cestui que use cannot, under the statute, take an estate more extensive than the seisin. Thus if land be conveyed to A. for life, to the use of B. for life, in tail or in fee, B. will under the statute take an estate determinable on the death of A. *Crawley's Case*, Cro. Eliz. 72. And see Dy. 186 a; Vaugh. 49; Bac. Uses,

47; Cro. Car. 231; 3 Bulst. 184; Sand. Uses, 109.

Much discussion formerly arose in determining where the seisin was, upon which the statute operated, in the case of springing or contingent uses during their suspense and when they came into existence, as, for instance, if an estate were conveyed to feoffees and their heirs to the use of A. for life, remainder to his first and other sons (then unborn) in tail, remainder to B. in fee. The difficulty arose in this way: as it was necessary that there should be a person seised to the use of the person to whom the use was limited, where and how was a seisin to be found in the feoffees to serve the contingent remainders to the first and other sons when they came into existence? Some contended that the legal estate or seisin continued in the feoffees in remainder expectant on the estate of freehold: others, that there remained in the feoffees, unexecuted by the statute, a possibility of seisin, or, as it was fancifully termed, a *scintilla juris et tituli*, to serve the contingent uses as they became vested (Sand. Uses, 110—114). A third party contended that the seisin was at once impressed upon all the uses, so that, in the case put, B. would take a *qualified* though vested estate, subject to be divested upon the birth of a son of A. See Hayes's Introd. 59; Pollexfen's very able argument in *Hales v. Risley*, Pollexf. 384; 1 Sugd. Pow. 41.

Whatever doubts there may have been upon this subject are now set at rest by 23 & 24 Vict. c. 38, s. 7,

which enacts, that "where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they rise by force of and by relation to the estate and seisin originally vested in the person seised to the uses, and the continued existence in him, or elsewhere, of any seisin to uses or scintilla juris, shall not be deemed necessary for the support of, or to give effect to, future or contingent or executory uses; nor shall any such seisin to uses or scintilla juris be deemed to be suspended, or to remain or to subsist in him or elsewhere." See *Peacock v. Eastland*, 10 L. R., Eq. 17—20.

In order to raise a use there must be either a direct or actual conveyance operating by way of transmutation of possession, or a contract or covenant operating as a bargain and sale, or a covenant to stand seised to uses (Sand. Uses, 114). A mere *executory* covenant (*Bainton's Case*, Dy. 96; *Blitheman v. Blitheman*, Cro. Eliz. 279; *Buckler v. Symons*, 2 Roll. Abr. 788; *Wingfield v. Littleton*, Dy. 162; *Audley's Case*, Ib. 166 a) or contract (*Trevor v. Trevor*, 1 P. Wms. 622; *Edwards v. Freeman*, 2 P. Wms. 435, 447) to convey or settle lands upon certain uses, will not raise a direct use, but requires a further conveyance or settlement to be executed for that purpose. Sed vide *Hylton v. Biscoe*, 2 Ves. 304, 308.

The Statute of Uses has no appli-

cation to a peerage, because, as we have before seen, before the statute neither uses nor trusts were applicable hereto. See *The Buckhurst Peerage*, 2 App. Ca. 1, 27.

2. *As to the Effect of the Operation of the Statute in joining the Seisin and the Use, and how far Limitations to Uses agree with or differ from Limitations at Common Law.*

By the operation of the statute all estate in the land is taken out of the person seised to uses; the estate therefore will not (as we have seen was the case before the statute), on account of the feoffee or releasee to uses, be liable to escheat, forfeiture, dower or curtesy (*Sneyd v. Sneyd*, 1 Atk. 443; Sand. Uses, 119). On the other hand, the estate of the cestui que use, which before the statute was only equitable, by its operation becomes legal, and therefore subject to all the legal incidents of a legal estate, as escheat, forfeiture, curtesy, dower, on account of the cestui que use. Sand. Uses, 119.

In general, limitations to uses receive the same construction as similar limitations at common law: thus in order to create an estate in fee simple (Sand. Uses, 122), or in fee tail (Ib. 123), the same words are necessary as in the case of a conveyance at common law.

So likewise, as is laid down in *Chudleigh's Case*, it was necessary that a use limited by way of remainder should take effect if at all before or immediately upon the determination of the particular estate, in the same manner as in the case

of a conveyance at common law. Hayes's Introd. 67. But see now 8 & 9 Vict. c. 106, s. 8, repealing 7 & 8 Vict. c. 76, s. 8, to the same effect, and 40 & 41 Vict. c. 33.

3. *What Objects either wholly unattainable or imperfectly attainable at Common Law became attainable by means of Uses under the Statute.*

Although, as we have seen in some respects, uses executed by the statute, by converting the equitable into a legal estate, follow the rules of common law, nevertheless the owner of freehold interests may, through the medium of uses executed by the statute, deal with his property with the same freedom as he could have done with the use before the statute. It becomes, therefore, important to examine what interests can be created by uses executed by the statute which cannot be created at common law.

At common law a person cannot convey or deliver seisin to himself as tenant for life or jointly with another (Sand. Uses, 129; Perk. s. 203), or as tenant in tail, or as remainderman in tail after a prior life interest in a stranger (*Greswold's Case*, Dy. 156a). In all these cases the estate limited to the owner would be absolutely void, and in the latter case he would take as reversioner not as a remainderman, and the only mode by which he could limit to himself such interests at law would be by conveying the estate to a third party, from whom a reconveyance might be taken conferring upon him the above-mentioned partial interests. By means,

however, of the statute acting upon uses all those interests may be limited by *one* deed. Thus A. may convey his estate to B. to the use of himself A. for life, or to the use of himself and B. jointly, or to the use of B. for life or in tail, remainder to the use of himself A. in tail. Hayes's *Intro.* 96, 4th ed.

Again, as husband and wife are at law considered as one person, a man cannot make a direct conveyance at common law to his wife (Co. Litt. 3 a, 112 a; *Moyse v. Gyles*, 2 Vern. 385; *Lucas v. Lucas*, 1 Atk. 271, note 2, Sand. Ed.). Under the Statute of Uses, A. may convey to B. and his heirs, to the use of his (A.'s) wife for life, or any other interest. Co. Litt. 112 a.

Again, at common law, joint tenants must take at the same time (Co. Litt. 9 a, 188 a; 2 Roll. Abr. 417, pl. 8); and if there be a conveyance to two persons, one capable and the other incapable of taking, the one who is capable takes the whole (1 Co. 100 b; 13 Co. 57). Through the medium, however, of the Statute of Uses, joint tenants can take at different times. Thus, if A. convey to B. and his heirs to the use of C. and any wife he may marry, although C. would take the whole estate at first, yet on his marriage his wife will take a joint interest with him. *Mutton's Case*, Moore, 96; *Dyer*, 274 b; 1 Co. 101 a; *Sanmes's Case*, 13 Co. 57; *Stratton v. Best*, 2 Bro. C. C. 233.

At common law no estate of freehold can be made to commence *in futuro*. Thus, if a grant were made to A. to commence in a year's time, the grant is void (Sand. Uses,

136). But if a man covenanted to stand seised, or bargained and sold lands, to future uses, as to the use of the heirs of his own body (22 Vin. Abr. 283; Carth. 263), or to the use of another person after his own death (*Osman v. Sheafe*, 3 Lev. 370; *Roe v. Tranmer*, 2 Wils. 75), or after a certain number of years (Bac. Uses, 63), the grant will be good, inasmuch as until the future event happens, there will be a resulting use to the covenantor or bargainor, in whom the seisin, to serve the future uses, remains. So, under an instrument operating by transmutation of possession as a feoffment or release, future uses may be created, if there be a commensurate seisin to serve them when they arise. Thus, if there be a conveyance by A. to B. and his heirs, to the use, after the expiration of four years, or, after the death of A., of C. and his heirs, the limitation to C. and his heirs is valid, inasmuch as during the four years, or during the life of A., there will be a resulting use to him, which will be executed by the statute (2 Salk. 675; Sand. Uses, 137); if, however, A. had executed a conveyance to B. and his heirs, to commence at a future period, as, for instance, after the death of A., to the use of C. and his heirs, it would have been void, as a freehold cannot be made to commence *in futuro*. *Roe v. Tranmer*, 2 Wils. 75; *Lamb v. Archer*, 1 Salk. 225; see also the recent case of *Boddington v. Robinson*, 10 L. R., Ex. 270, in which, however, it was held that an express grant of a life estate in the premises *in presenti*,

was not controlled by a grant in the habendum to commence *in futuro*.

At common law, it is a maxim that no estate can be limited after a fee simple. Thus, if a feoffment be made to A. in fee, with a proviso that on a certain event happening it should go over to B., the limitation to B. is void (see Co. Litt. 18 a; *Seymour's Case*, 10 Co. 97 b; Dy. 33 a; 1 Co. 85 b). Under the Statute of Uses, it is clear, that such limitations, termed "springing or shifting uses," would be good.

It was, indeed, urged in *Chudleigh's Case*, that it would be wrong to make "any estate of freehold and inheritance lawfully vested to cease as to one, and to vest in others, against the rule of law, and that no estates should be raised by way of use but those which could be raised by livery of seisin at common law." That reasoning, however did not prevail.

Since, however, shifting uses, limited after estates in fee simple, cannot be barred (*Lloyd v. Carew*, Pree. Ch. 72), it was necessary to confine them within due limits, which was effected by means of the Rule against Perpetuities (see *Cadell v. Palmer*, and note, post), according to which, unless the event upon which the limitations over are to take effect will *necessarily* take place within a life or lives in being and twenty-one years after, such limitations are void. The rule, however, is not applicable where the limitations over are after an estate tail, as the tenant in tail might at any time, by barring it, acquire a fee simple, and thus de-

feat the limitations over, which do not therefore require to be confined to take effect within the time prescribed by the Rule against Perpetuities (*Page v. Hayward*, 2 Salk. 570; *Goodiar v. Clarke*, 1 Sid. 102; 1 Lev. 35; *Cadell v. Palmer*, and note, post). These shifting uses are similar to executory devises.

Again, at common law, every remainder must be limited, so as to await the regular determination of the particular estate before it can take effect in possession (Plowd. 24; *Cogan v. Cogan*, Cro. Eliz. 360; *Fearne*, 9, 390, 394; 1 Co. 134 b). Under the Statute of Uses, however, a particular estate may be made to determine by the happening of some event before its natural determination. Thus, if a conveyance be made to A. and his heirs, to the use of B. in tail or for life, provided that if C. return from Rome, then to D. in fee; on the return of C. the limitation to D. will take effect, by destroying the estate of A. before its regular determination (2 Leon. 16); but the tenant in tail could in the case lastly mentioned, at any time before C.'s return from Rome, bar the limitation over. *Page v. Hayward*, 2 Salk. 579; Sand. Uses, 153.

It must, however, be remembered, that by means of a *conditional limitation* the same effects may be produced as by springing or shifting uses. Thus, if a feoffment be made to A. and the heirs of his body *until* C. return from Rome, and after C.'s return to B. in fee; here, upon C.'s return the limitation to B. will vest, inasmuch as the estate of A. thereupon determines by the nature of

its limitation (W. Jones, 58; Sand. Uses, 152); but if the gift had been to A. in tail, *provided or upon condition* that if C. return from Rome then to B. in fee; in this case the limitation could not take effect as a remainder, because the estate tail could not cease without an entry by the grantor or his heirs, which entry would defeat the remainder (Co. Litt. 214 b; W. Jones, 58; Plowd. 413; Sand. Uses, 152); but, as we have before seen, the limitation over to D. would take effect through the medium of the Statute of Uses acting upon the seisin of a releasee or feoffee to uses. See further on this subject, Sand. Uses, 151.

4. *As to Powers deriving their Effect from the Statute of Uses.*

The shifting or springing uses which we have already noticed, take effect upon the happening of some event, mentioned in the instrument, creating the limitations which are thereby defeated. Another kind of shifting or springing use is that which takes effect through the instrumentality of some person named in the instrument, who designates certain uses by an *appointment* under an authority to him for such purpose given—which is termed a *power*—he being called the donee of the power, and the person who confers it the donor of the power.

As to the different kinds of powers, their extinguishment and suspension, see *Edwards v. Slater*, and note, post.

An appointment, whether the power conferring it precedes, or is

subsequent to limitations to uses, has in each case the same effect, viz., that of defeating the limitations. In both cases it takes effect as a power of revocation and appointment, although a power of revocation need not in the former case be expressly conferred. Co. Litt. 272 a, Butler's note, VII.

In all cases, however, an appointment takes effect as a declaration of uses, and the statute executes the possession by drawing to them the seisin created by the instrument giving the power.

Thus, if an estate were conveyed to A. and his heirs to the use of B. for life, remainder to such uses generally, or to such son of B. as B. should appoint, and B. appoints to the use of his first son in fee, immediately upon the appointment (subject to B.'s life estate) the son would take the legal fee, the seisin of A., by operation of the statute, being joined to the declaration of the use in favour of the son.

If in the case supposed power had been given to A. with the consent of B., or to B. to sell and exchange, to lease, to make a jointure for a wife, or charges for children, immediately upon the execution of the power, which would operate as a declaration of a use, the legal seisin of A. would be joined thereto by the statute.

An appointment operates without transmutation of possession. Thus, if a person having a general power of appointment by deed, appoint to A. to the use of B., the use to A. will by means of the statute receive the accession of the legal estate, and B. will only take an equitable estate.

In general an appointment takes effect, in the same manner as if it had been inserted in the instrument creating the power. Thus, if an estate were conveyed to A. and his heirs to the use of B. for life, remainder to such uses as C. should appoint, and in default of appointment to the use of C. and his heirs, if C. afterwards appoints the estate to D. for life, remainder to D.'s first and other sons in tail male, the result will be the same as if the original deed had been to A. and his heirs, to the use of B. for life, remainder to D. for life, remainder to D.'s first and other sons in tail male, remainder to C. and his heirs. See Co. Litt. 272 a, Butler's note.

5. *As to the Mode in which Conveyances to Uses operate.*

In considering in what mode conveyances to uses operate, as the seisin is added by the statute to the use, it is material to know accurately in whom, by the different instruments adopted by conveyancers, the seisin is vested, inasmuch as some instruments operate by, others without, transmutation of the possession.

Instruments operating without Transmutation of Possession.

A bargain and sale, and a covenant to stand seised, operate without transmutation of possession. A bargain and sale is considered as a contract, whereby the bargainer, in consideration of money, bargains and sells and contracts to convey an estate to the bargainee. Thus, if A. executed a bargain and sale to

B., the seisin before the Statute of Uses remained in A., and after the statute was executed in B. Hayes's Introd. 68, 4th ed.

But where there is a conveyance of a reversion at common law, there is no reason, because the words "bargain and sell" are introduced, why the instrument should not operate as a grant, and why there should not be a limitation of uses.

The operation of a covenant to stand seised (the consideration for which is lawful blood or marriage) is similar. For instance, if A. on the marriage of his son B. covenanted to stand seised to the use of B. and his heirs for ever, the seisin, which before the statute would have been in A., would by it be transferred to the use of B. Hayes's Introd. 69.

Instruments operating by Transmutation of Possession.

Instruments operating by transmutation of possession are feoffments, grants, as formerly were fines and recoveries (abolished by 3 & 4 Will. 4, c. 74). Thus, if A. enfeoffed B. to the use of C., the seisin is conveyed from A. to B. and by operation of the statute it is joined to the use in C.

To these may be added the lease and release, the origin of which was as follows. Many evils having been found to result from the secrecy of instruments not requiring livery of seisin, or not being of record, in order to give publicity to transfers of land the Statute of Inrolments (27 Hen. 8, c. 16) was passed, by which bargains and sales were to have no effect in regard to *freehold* interests, unless made by deed in-

dented and enrolled within six months from the date thereof. This was called a bargain and sale enrolled. The ingenuity of lawyers perceiving that the statute did not apply to leasehold interests, soon invented a mode of defeating the object of the legislature and of passing lands without the publicity intended. This was by the instruments known by the name of Lease and Release. The conveying party, by bargain and sale, conveyed the land to the purchaser for a nominal consideration for a year, which by the operation of the statute gave him the legal estate for a year, and he therefore became tenant in possession of the vendor without entry; and at common law the vendor might then release his remaining interest or *reversion* to the tenant. And neither the lease nor the release required enrolment.

This mode of conveyance remained for a long time in use, until the lease was made unnecessary by 4 & 5 Vict. c. 21, which rendered a release as effectual for the conveyance of freehold estates as a lease and release by the same parties; but the release was made liable to the same stamp duty as if a lease or bargain and sale for a year had been executed. And by 8 & 9 Vict. c. 106, s. 2 (repealing 7 & 8 Vict. c. 76), after the 1st October, 1845, all corporeal tenements and hereditaments, as regards the conveyance of the immediate freehold thereof, are deemed to *lie in grant* as well as in livery; but every deed, which by force only of that enactment is effectual as a grant, is chargeable with the stamp duty

with which the same deed would have been chargeable in case the same had been a release founded on a lease or bargain and sale for a year, and also with the same stamp duty (exclusive of progressive duty) with which such lease or bargain and sale for a year would have been chargeable.

However, by 13 & 14 Vict. c. 97, s. 6, it is enacted that the duties then payable for or in respect of any such bargain and sale for a year under 4 & 5 Vict. c. 21, and 8 & 9 Vict. c. 106, should, so far as the same related to any instrument which should bear date after the 10th of October, 1850, be and the same were thereby repealed. 13 & 14 Vict. c. 97, has been repealed by stat. 33 & 34 Vict. c. 99, and the stamp duties on all deeds is now regulated by the Stamp Act, 1870 (33 & 34 Vict. c. 97).

It is important to bear in mind the distinction between instruments operating by, and those operating without, transmutation of possession, otherwise much confusion will arise in determining to whom the legal estate belongs. Thus, if property be conveyed by an instrument operating by transmutation of possession, as a feoffment, lease, and release, or grant by A. to B. and his heirs, to the use of C. and his heirs, then the seisin is conveyed from A. to B. and executed by the statute in C. If in an instrument not operating by transmutation of possession, as a bargain and sale by A. to B. to the use of C., here, as the seisin remained in A., but is executed by the statute in B. who takes the legal estate, C. takes only

an equitable estate; "as there cannot be," as is laid down in *Tyrrell's Case*, "a use upon a use." See 2 Davids. Convey. 143, 2nd ed.

6. *As to Declarations of Uses.*

Formerly declarations of uses, being intended to be secret, rested merely in parol between the feoffee and the cestui que use; but since the Statute of Frauds (29 Car. 2, c. 3) declarations of trust relating to land must be in writing. By the 7th section of that statute it is enacted, "that from and after the 24th day of June (1677), all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

Instruments not operating by way of transmutation of possession, as a bargain and sale, a covenant to stand seised, and an appointment under a power, are mere declarations of uses, to which the seisin vested in the bargainor, covenantor, or (in the case of the power) in the feoffee or releasee to uses, is executed by the Statute of Uses.

In instruments operating by transmutation of possession, the uses may be declared, either in the same or in a distinct instrument. The former is usually the case in a feoffment, or lease and release, or (what is now substituted for the latter) a grant.

Before fines and recoveries were abolished by 3 & 4 Will. 4, c. 74, uses might be declared by a deed executed either previously or subse-

quently to the fine or the recovery being levied or suffered (4 Anne, c. 16, s. 15). If the deed were executed before the fine or recovery it was said to *lead*, if after, to *declare*, the uses and trusts thereof, and in neither case was it necessary that a consideration should be expressed. Harg. Co. Litt. 123 a, note 8; 1 Ld. Raym. 290; Sand. Uses, 219.

Where a fine or recovery was conformable with the deed leading the uses, the latter might be varied or completely altered *before* the fine was levied or the recovery suffered; but the variation or alteration could only be made with the consent of all the parties interested (Shep. Touch. 519; *Stapilton v. Stapilton*, 1 Atk. 2; 2 L. Cas. Eq. 836, 5th ed.), and by a deed or other instrument of as high a nature as that leading the uses, according to the maxim "*Nihil tam conveniens est naturali æquitati, unumquodque dissolvi eo ligamine quo ligatum est*" (*Countess of Rutland's Case*, 5 Co. 26 a). But if the fine or recovery varied in time, persons or circumstances from the first deed, the uses thereby declared might be varied by an instrument of not so high a nature, for instance, by a mere writing not under seal, executed *before* the fine or recovery (*Jones v. Morley*, 2 Salk. 677), and even it seems *after* (Ib.; Shep. Touch. 520), if the variation were made by deed (see Gilb. Uses, 111, Sugd. n.); and it was not essential that all the persons interested in the first declaration should be parties to the second. *Countess of Rutland's Case*, 5 Co. 25 b.

The deed, however, leading the

uses will not be controlled by any other executed *subsequent* to the levying of the fine or the suffering of the recovery, where the fine or recovery did not in circumstances vary from the first deed. Shep. Touch. 520; *Tregame v. Fletcher*, 2 Salk. 676; 9 Co. 10b, 11a; Comb. 429; 1 Atk. 9.

The fine or recovery would have enured to the uses of the deed leading them, although not in all respects corresponding in circumstances therewith, if there were no subsequent declaration of uses. Shep. Touch. 520; *Haverhill v. Hare*, 2 Roll. Abr. 799; 1 Atk. 7; 13 Vin. Abr. 306, pl. 2, P. a. 2.

It seems that a declaration of use declared according to 4 Anne, c. 16, s. 15, by deed, subsequent to the fine or recovery, there having been no deed leading the uses, might be controlled by another deed, although there may have been no variance in the fine or recovery. *Tregame v. Fletcher*, 2 Salk. 676; *Varisor's Case*, Dyer, 307 b; Shep. Touch. 519, 521.

Where there were two declarations of uses in the same instrument quite contradictory to each other, the former would prevail. *Southcoat v. Manory*, Cro. Eliz. 744; *Wilnot v. Knowles*, Moore, 680; *Doe d. Leicester v. Biggs*, 2 Taunt. 109; Shep. Touch. 88.

No formal words are essential to the validity of a declaration of a use (Sand. Uses, 229); it must, however, be certain, especially as to the persons in whose favour the uses are declared, the estates which they are to take, and as to the lands which form the subject-

matter of the declaration. *Ib.*; Shep. Touch. 519.

7. *How far the Statute of Uses is applicable to Wills.*

Under this head it is important to consider, 1st. Whether uses created by wills operate under the Statute; 2nd. In what cases devisees take the legal estate as trustees; 3rd. The quantity of the estate devisees take as trustees.

(1.) *Whether Uses created by Wills operate under the Statute of Uses.*

Previous to the Statutes of Wills (32 Hen. 8, c. 5, and 34 & 35 Hen. 8, c. 5; both repealed by 1 Vict. c. 26, except as to wills made before 1838), save where lands in particular localities were devisable by custom, the only mode of passing lands by will was by means of a conveyance to uses, upon which a subsequent will, operating as a declaration of use, would be enforced by a Court of Equity.

By the statute of 27 Hen. 8, c. 10, the possession being joined to the use this power of indirectly devising lands was taken away; but, having once enjoyed the testamentary power over land, the people took the first opportunity of regaining it; accordingly, by 32 Hen. 8, c. 5, and 34 & 35 Hen. 8, c. 1, power was given by the legislature to devise the whole of lands held in common socage, and two-thirds of land held by knights' service. And as by 12 Car. 2, c. 24, lands held by tenure of knights' service were converted into socage, all freehold lands became devisable.

The question then arose, whether the Statute of Uses which it will be observed passed before the acts giving power to devise lands was applicable to lands given by wills. no decision has been actually given upon the point, and in reality, it is not very material, as in order to carry out the intention of the testator the legal estate is transferred to the use in the same mode as it would be by the operation of the statute. Thus, if there were a devise of freeholds simply to A. and his heirs, to the use of or in trust for B. and his heirs, B. would take the legal estate (*Sand. Uses*, 243; *Doe d. Booth v. Field*, 2 Barn. & Ad. 564, 570; *Hawkins v. Luscombe*, 2 Swanst. 392; sed vide 1 Sugd. Pow. 6 Ed. 175; *Harris v. Pugh*, 12 Moore, 1, n., 577); and the employment of the words "use" and "trust" indifferently in a series of limitations will not alter the construction. *Doe d. Collier v. Terry*, 11 East, 377. On the other hand, a devise unto and the use of A. simply to the use of or in trust for B. and his heirs, would, upon the ground that there cannot be a use upon a use, confer the legal estate upon A., the equitable estate upon B. See also *Baker v. White*, 20 L. R., Eq. 171.

A devise, however, of copyholds to A. upon trust for B. gives the legal estate in the copyholds to A., and the reason of it is this, that you can have no aid from the analogy of the Statute of Uses; the testator cannot intend to tell you it is to be settled according to the Statute of Uses, because the Statute of Uses never did apply to copyholds. Per

T.L.C.

Sir G. Jessel, M. R., in *Baker v. White*, 20 L. R., Eq. 175.

The same observation applies likewise to leasehold. See *Houston v. Hughes*, 6 B. & C. 403; *Allen v. Bewsey*, 7 Ch. D. 453.

Where an appointment is made by a will under a power, as it is a mere declaration of a use, the person nominated will take the legal estate, although he may have no active duties to perform; and although it may be stated to be "to the use" of another person, such person will only take an equitable estate. 2 Jarm. Wills, 284, 3rd ed.

(2.) *In what cases Devisees take the Legal Estate as Trustees.*

A difficulty, however, often arises in determining when freehold property is devised to a person (having certain duties to perform), and his heirs, to the use of or in trust for another, whether the devisee in fee takes the legal estate, or whether it is vested in the person having the beneficial interest. In the case of a simple devise, where the devisee is a mere passive instrument, and has no duty to perform, as we have seen, the legal estate passes to the person entitled to the beneficial estate. Where, however, there is a devise in fee to a person who have active duties to perform, which require for their performance that the legal estate should be vested in him, he will be held to have such legal estate; as, for instance, when he is directed to pay the rents to the cestui que trust (*Doe v. Homfray*, 6 Ad. & Ell. 206; *Doe v. Field*, 2 Barn. & Ad. 564), or to apply them for any purposes,

A A

such as payment of rates, taxes and repairs (*Shapland v. Smith*, 1 Bro. C. C. 74; *Browne v. Ramsden*, 2 Moo. 612; *Tenny d. Gibbs v. Moody*, 3 Bing. 3; 10 Moo. 252), or debts and legacies charged on land, either primarily or in aid of personalty (*Murthwaite v. Jenkinson*, 2 Barn. & Cress. 357), or contingently upon the personalty proving insufficient, if the contingency happens (*Doe d. Cadogan v. Ewart*, 7 Ad. & Ell. 636; *Poad v. Watson*, 6 Ell. & Bl. 619; sed vide *Doe v. Shotter*, 8 Ad. & Ell. 905; *Hawker v. Hawker*, 3 B. & Ald. 537; *Carlyon v. Truscott*, 20 L. R., Eq. 348), or for the maintenance of the cestui que trust (*Silverster v. Wilson*, 2 T. R. 444; *Doe v. Ironmonger*, 3 East, 535; *Reynell v. Reynell*, 10 Beav. 21; *Plenty v. West*, 6 C. B. 201; *Berry v. Berry*, 7 Ch. D. 657), or where he is directed "to preserve" the estates for the persons taking beneficially, and it is necessary that he should have the legal estate in fee to preserve contingent remainders (*Watkins v. Frederick*, 11 H. L. Ca. 358); à fortiori, where he has also to raise sums charged on the estates. Ib.

But a mere charge of debts and legacies, where the duty of paying them is not thrown upon the trustees, will not confer the legal estate (*Kenrick v. Beaucherk*, 3 Bos. & Pul. 175; *Doe d. Müller v. Claridge*, 6 C. B. 641; *Poad v. Watson*, 6 Ell. & Bl. 606), unless clearly equitable estates of a limited character are given in remainder, which might determine before the debts were paid off, in which case it seems the trustees would take the whole legal es-

tate. See *Creaton v. Creaton*, 3 Sm. & Giff. 386; there a testator, after directing payment of his debts, in the first place, devised all his copyhold estates to three trustees (also his executors) and the survivor of them, and the heirs of the survivor, upon trust to pay the rents to his daughters, and the survivor of them, for life in equal moieties, and after the decease of the survivor, he devised the estate in moieties, to the heirs of the body of each of his daughters, with remainder over to the right heirs of his surviving daughter. It was held by Sir J. Stuart, V.-C., that the interests limited in remainder were equitable estates, and that the trustees took the whole legal fee. See also *Spence v. Spence*, 12 C. B., N. S. 199.

As a general rule, where there is a devise to a person and his heirs, upon trust to permit another to receive the rents, the beneficial owner will also take the legal estate. *Right d. Phillips v. Smith*, 12 East, 455; *Doe d. Noble v. Bolton*, 11 Ad. & Ell. 188; *Baker v. White*, 20 L. R., Eq. 171; but see *Gregory v. Henderson*, 4 Taunt. 772.

There are, however, some exceptions to the rule where it is necessary for some other purpose that the first devisee should have the legal estate, as where the devise is also to preserve contingent remainders (*Briscoe v. Perkins*, 1 V. & B. 485; *White v. Parker*, 1 Bing. N. C. 573; 1 Scott, 542; and see *Riley v. Garnett*, 3 De G. & S. 629); or where the devise is to permit a married woman to receive the rents for her separate use (*Harton v. Harton*, 7 T. R. 652; *Doe d. Wood-*

cock v. Barthrop, 5 Taunt. 382; *Robinson v. Grey*, 9 East, 1; *Hawkins v. Luscombe*, 2 Swanst. 375; *Doe d. Stevens v. Scott*, 4 Bing. 505; 1 M. & P. 317; *Creaton v. Creaton*, 3 Sm. & Giff. 386; *In re Eddel's Trusts*, 11 L. R., Eq. 559); or where it appears that the trustees are to exercise a control, as where the receipts are to be "with the approbation of any one of the trustees" (*Gregory v. Henderson*, 4 Taunt. 772; and *Broughton v. Langley*, Salk. 679; 2 Ld. Raym. 873; 1 Lutw. 823); or where it appears by implication that the trustees are to make certain payments previously to the receipt of the rents by the beneficial owner, as where such beneficial owner is to receive "the net rents and profits" (*Barker v. Greenwood*, 4 M. & W. 421). In all these cases the first devisee will take the legal estate.

Where in a will there was a devise of freeholds to two persons, and the survivor of them, his heirs and assigns, upon trust "to pay unto or permit and suffer A. C. to have, receive and take the rents, issues and profits of the estate," it was held that A. C. took the legal estate. "The last words," said Mansfield, C. J., 'are permit and suffer,' which give the cestui que trust a legal estate; and the general rule is, that if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail; and consequently, for want of a better reason, we are forced to say that we think this will gives the legal estate to the party beneficially interested." *Doe d. Leicester v. Biggs*, 2 Taunt. 109; see also

Sherwin v. Kenny, 16 I. Ch. Rep. 138.

And it is immaterial that there is a receipt clause declaring the receipts of the trustees and executors to be good discharges, even although they are not *all* the same persons; at any rate, if effect can be given to the clause without entitling the trustees to receive the rents of the devised estates in question. *Baker v. White*, 20 L. R., Eq. 166, 172.

Where, however, there is a devise of copyholds to A. and B., their heirs and assigns, upon trust during the life of C. to receive and pay the rents to C., or to permit him to receive the same, especially where the trustees and executors (A. and B. being two of the latter) have power to give receipts, it will vest the legal estate in A. and B. during the life of C. *Baker v. White*, 20 L. R., Eq. 166.

Where there is a devise to a person to sell or convey an estate (*Garth v. Baldwin*, 2 Ves. 645; *Doe d. Booth v. Field*, 2 Barn. & Ad. 564; *Doe d. Shelley v. Edlin*, 4 Ad. & Ell. 582; *Cox v. Parker*, 22 Beav. 168); a fortiori, if there are other purposes rendering it necessary that he should have some estate (*Bagshaw v. Spencer*, 1 Ves. 142; *Gibson v. Rogers*, Amb. 93; *Sanford v. Irby*, 3 Barn. & Ald. 654; *Doe d. Edlin*, 4 Ad. & Ell. 582; *Doe d. Noble v. Bolton*, 11 Ad. & Ell. 188; *Rackham v. Siddall*, 1 Mac. & G. 607; *Reynell v. Reynell*, 10 Beav. 21; *Watson v. Pearson*, 2 Exch. 581; *Blaggrave v. Blaggrave*, 4 Exch. 550; but see *Hawker v. Hawker*, 3 Barn. & Ald. 537), the devisee will take the legal estate.

It has been held that the appointment of persons as trustees of inheritance for the execution of a will (*Trent v. Hanning*, 1 Bos. & P., N. R. 116; 10 Ves. 495; 7 East, 97; 1 Dow, 102), or of a person as "executor of a will so far as was necessary for the performance of the trusts relating to the testator's real estate" (*Plenty v. West*, 6 C. B. 201), vested in them the legal fee. See also *Anthony v. Rees*, 2 Cr. & Jer. 75; *Doe d. Gillard v. Gillard*, 5 B. & Ald. 785; *Re Hough's Will*, 4 De G. & Sm. 371; *Sidebotham v. Watson*, 11 Hare, 170; *Re Turner*, 2 De G., F. & J. 527.

The Quantity of the Estate Devises take as Trustees.

A general devise to trustees and their heirs under a will, the purposes of which require them to have some legal estate of freehold, *prima facie* gives the legal fee, and it lies on the parties alleging that they take a less estate to show what less estate will serve the purpose. *Collier v. Walters*, 17 L. R., Eq. 252.

Thus a devise to trustees and their heirs, with a direction to sell or convey as contradistinguished from a mere power of sale (*Cunliffe v. Brancker*, 3 Ch. D. 393), will confer upon them the fee (*Bagshaw v. Spencer*, 1 Ves. 142; 2 Atk. 570; *Doe d. Shelley v. Edlin*, 4 Ad. & E. 582; *Rackham v. Siddall*, 1 Mac. & G. 607; *Blaggrave v. Blaggrave*, 4 Ex. 550; *Sherwin v. Kenny*, 16 I. Ch. Rep. 138, 155). And it is immaterial that a legal life estate is vested in another person before the direction to convey is given to the trustees, in which case they will take

the legal fee subject to the prior legal interest for life. *Doe d. Noble v. Bolton*, 11 Ad. & Ell. 188.

In cases before the Wills Act (1 Vict. c. 26), where, in consequence of the absence of words of limitation, the fee would not ordinarily have passed to the trustees, a trust to sell will give them the fee. See *Doe d. Cadogan v. Ewart*, 7 Ad. & Ell. 636.

A direction, however, in the case of copyholds devised to trustees till A. attains twenty-one, when they are to be transferred to A., does not require, and will not therefore confer upon the trustees the legal estate. *Doe d. Player v. Nicholls*, 1 B. & C. 336.

So where there is a devise to trustees and their heirs, with a direction to let for an indefinite term, as distinguished from a mere power of leasing, it will show that in order to effectuate the intention of the testator they must have an estate in fee, inasmuch as such an estate in them is necessary for enabling them to execute the purposes of their trust (*Doe d. Tomkyns v. Willan*, 2 B. & Ald. 84; *Doe d. Keen v. Walbank*, 2 B. & Ald. 554; *Riley v. Garnett*, 3 De G. & S. 629; *Collier v. Walters*, 17 L. R., Eq. 252, 257); *a fortiori*, where the trustees, having authority to lease, are directed out of the rents and profits to make payments to persons interested for life (*Doe d. Tomkyns v. Willan*, 2 B. & Ald. 84, 92), or for taxes and repairs (*White v. Parker*, 1 Bing. N. C. 573), or are empowered out of the value of timber from time to time to pay debts, interest and legacies. *Collier v. Walters*, 17 L. R., Eq. 252.

The same result follows where trustees have power "to set and let land" generally (*Collier v. Walters*, 17 L. R., Eq. 253), or to accept surrenders of leases (*Blaggrave v. Blaggrave*, 4 Exch. 550); but this will not be the case where the power to lease is limited to the continuance of the trust. *Doe d. Kimber v. Cafe*, 7 Ex. 675.

No indication of intention that the trustees to uses should have the legal fee can be gathered from their having the ordinary powers of sale and exchange or leasing, which do not require for their exercise that the trustee should have the legal fee (*Cunliffe v. Brancker*, 3 Ch. D. 402), nor is any such intention to be inferred from the trustees having a power to sell timber, which does not require a fee simple estate or any other estate for its exercise. *Ib.* 403.

A devise to trustees, their heirs and assigns, or to trustees simply since the 1 Vict. c. 26, with a general direction for them to pay debts, will give them the legal fee, and it will not be cut down to a smaller interest (*Spence v. Spence*, 12 C. B., N. S. 199; *Smith v. Smith*, 11 C. B., N. S. 121; and see *Creaton v. Creaton*, 3 Sm. & G. 386). Secus, where there is a mere general charge of debts. *Kenrick v. Lord Beauclerk*, 3 B. & P. 175, 178.

Where there is a devise to trustees and their heirs upon trust for the separate use of a married woman for life, with remainder to her issue in tail, followed by similar trusts for the use of other married women and their issue successively, the persons entitled in remainder immediately after the married

women will not take legal estates, as the legal estate by way of use executed in fee simple will be vested in the trustees, such construction being necessary in order to give legal effect to the testator's intention to secure the beneficial interest to the separate use of the several feme coverts. *Harton v. Harton*, 7 T. R. 652. See also *Brown v. Whiteaway*, 8 Hare, 145; *Toller v. Attwood*, 15 Q. B. 929.

Where there has been a devise in fee to trustees, a mere possibility that the legal estate in fee may be wanted by them for certain purposes will suffice to prevent it being cut down to any less estate. Thus, in *Fenwick v. Potts*, 8 De G., Mac. & G. 506, where a testator, after the Apportionment Act (4 Will. 4, c. 22), devised freehold lands to two trustees, *their heirs and assigns*, upon trust to pay thereout to his widow an annuity for her life, and after her decease then upon trust for A. and B., their heirs and assigns, as tenants in common, it was held by the Lords Justices of the Court of Appeal that the legal estate in the trustees was not restricted to the life of the widow. "Under this devise," said Turner, L. J., "I apprehend that if the annuity was in arrears the trustees would be bound to raise the arrears by sale or mortgage, and they must have the fee to enable them to do so." *Jenkins v. Jenkins*, 1 Wills, 650.

It has been laid down in the House of Lords that a clear express devise to trustees in fee will not be cut down, although the trust declared is not so extensive as the

legal estate. *Watkins v. Frederick*, 11 H. L. Ca. 366, per Lord Westbury, L. C.

And there is another rule which may be collected from all the authorities, that you cannot cut down an estate in fee simple given to trustees unless you can point out on the face of the will what less estate the trustees take. *Collier v. Walter*, 17 L. R., Eq. 252, 263.

Where the limitation is to trustees, their executors and administrators, they will not, it seems, take the fee, unless it can from the rest of the will be affirmatively made out that they were intended to have it (per Sir G. Jessel, M. R., in *Collier v. Walters*, 17 L. R., Eq. 257; *Doe v. Simpson*, 5 East, 162). It was, however, laid down by Lord Langdale, M. R., in *Heardson v. Williamson*, 1 Keen. 33, that the circumstance of the estate being limited to the trustees, "their executors and administrators," and not to trustees "and their heirs, would not affect the vesting of the fee in the trustees if the purpose of the will required it."

Where, however, there is a devise to trustees and their heirs, and a less estate would certainly enable the trustees to fulfil all the trusts, the fee simple would be cut down to that estate; in other words, no greater estate will be conferred upon the trustees than what is necessary for them to fulfil the trusts imposed upon them.

Thus if there be a devise of freeholds to A., his heirs and assigns for ever, upon trust *to pay and apply the rents* to the separate use of B., a married woman, for life, and

after her decease to the use of the heirs of her body, in this case A. would take the legal estate during B.'s life, because it is necessary that he should have it, for the purpose of receiving the rents and paying them to B.; but, as the necessity ceases upon her death, his legal estate would then determine. *Doe d. Hallen v. Ironmonger*, 3 East, 533; *Robinson v. Grey*, 9 East, 1; *Cooke v. Blake*, 1 Exch. 220; *Playford v. Hoare*, 3 Y. & J. 175; *Adams v. Adams*, 6 Q. B. 860; *Doe d. Player v. Nicholls*, 1 Barn. & C. 335; *Ward v. Burbury*, 18 Beav. 190; *Keefe v. Kirby*, 6 Ir. C. L. Rep. (N. S.) 591; *Sterenson v. The Mayor of Liverpool*, 10 L. R., Q. B. 81; sed vide *Farmer v. Francis*, 9 Moore, 310; *Collier v. McBean*, 34 Beav. 426.

So a devise to trustees and their heirs upon trust to pay the rents to A. for life, with remainder to B., will confer upon them an estate for the life of A. only. *Playford v. Hoare*, 3 Y. & Jer. 175.

This has also been decided: that if instead of a simple remainder, the testator begins again and gives the property in this way, "I give Blackacre to A. and B. and their heirs upon trust to pay the rents to C. for life, and after the decease of C., I give and devise Blackacre to D.," then, it being what is called a new devise, it has been held to be equally clear that the devisee takes the legal estate, it being the beginning of a new devise; the estate of the trustees, although not in terms limited to the life of the first beneficial owner, is read as if it were so limited. Per Sir G. Jessel, M. R., in

Baker v. White, 20 L. R., Eq. 176. See also *Adams v. Adams*, 6 Q. B. 860; *Cooke v. Blake*, 1 Ex. 220.

So a devise to trustees and *their heirs* upon trust, during the minorities of A. and B., to employ the rents and profits for their maintenance and education, with remainder when they should respectively attain twenty-one, to the use of A. and B. and their heirs, the trustees will take the legal estate during the minorities of A. and B. only. *Goodtitle d. Hayward v. Whitby*, 1 Burr. 228.

Even in the case of copyholds, the legal estate, according to the general rule, will be carried only so far as is necessary to effectuate the several intentions of the will. *Doe d. Woodcock v. Barthrop*, 5 Taunt. 382.

The law is the same with regard to leasehold estates. See *Stevenson v. The Mayor of Liverpool*, 10 Q. B. 84; *Baker v. White*, 20 L. R., Eq. 176. Hence it has been laid down as regards the three descriptions of estates—freeholds, copyholds, and leaseholds,—that “where there is an indefinite devise to trustees and *their heirs*, upon trust to pay or allow somebody to receive the rents during life, followed either by a simple remainder to another person in fee simple, or in fee tail, or as another person shall appoint, but giving an absolute interest, or followed by a new devise to a person in fee simple or fee tail, or giving an absolute interest—in either of these cases the estate of the trustees by implication is to be limited to the life of the person who takes the first life interest.” Per Sir G. Jessel, M. R., in *Baker v. White*, 20 L. R., Eq. 177, 178.

Where freeholds and copyholds are devised in the same terms, it does not follow because the devisee takes a legal estate in the copyholds, that he should take the same estate in the freeholds. See *Baker v. White*, 20 L. R., Eq. 166. There a testator devised freeholds and copyholds to A. and B., to hold the same to A. and B., their heirs, executors, administrators, and assigns, upon trust, during the life of J., to receive the rents thereof, and pay the same to J. for life, or otherwise to permit J. to receive them, followed by a devise after J.’s death to the use of the heirs of his body. The testator appointed A. B. and J. executors of his will, and declared that the receipts of his said trustees and executors for any money payable under the will, should be a sufficient discharge to any person paying the same. It was held by Sir G. Jessel, M. R. (dissenting from the decision of Lord Romilly, M. R., in *Baker v. Parson*, 42 L. J., Ch. 228, upon the construction of the same will), that J. took a legal estate tail in the freeholds, and an equitable estate for life in the copyholds; that the construction of the will would clearly have been so had the devise of the freeholds and copyholds been distinct; that the circumstance that A. and B. took the legal estate in the copyholds was no argument for their taking, under an imaginary theory of attraction, the legal estate in the freeholds, and that full effect might be given to the receipt clause, by referring it to the copyholds only, the rents of which A. and B. would receive during the life of J. See also *Houston v. Hughes*, 6 B. & C.

403, and the comments thereon in *Baker v. White*, 20 L. R., Eq. 173.

Under the old law, where an estate was devised to trustees, without any limitation of the quantity of interest, for a limited purpose, as for payment out of rents and profits of legacies and debts (*Cor-dall's Case*, Cro. El. 315; *Carter v. Barnadiston*, 1 P. Wms. 505; 2 Eq. Ca. Abr. 224, pl. 5, 6; 3 Bro. P. C. 64, Toml. Ed.; *Hitchens v. Hitchins*, 2 Vern. 403; Prec. Ch. 133; see also *Gibson v. Montfort*, 1 Ves. 485; *Doe v. Claridge*, 6 C. B. 641), or a gross sum (*Doe d. White v. Simpson*, 5 East, 162), or incumbrances (*Heardson v. Williamson*, 1 Keen, 33), with remainder to persons to whom the beneficial interest is given, the legal estate given to the trustees is merely a chattel interest for an indefinite term of years. See also *Ackland v. Lutley*, 9 Ad. & El. 879.

And where the trusts are for the payment of annuities for lives, and then a sum in gross out of the rents and profits, it was held that the trustees took an estate for the lives of the annuitants, with a term of years for raising the sum. *Doe d. White v. Simpson*, 5 East, 162.

But in all these cases the estate of the trustees would cease on the satisfaction of the limited purpose, the person entitled to the beneficial interest thereupon taking the legal estate.

In order to obviate some of the difficulties arising from the rules of construction which have been before examined, it has been enacted by the new Wills Act (1 Vict. c. 26, s. 30), "that where any real estate (other than or not being a presenta-

tion to a church), shall be devised to any trustee or executor, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication."

By section 31, it is enacted, "that where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue, beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple, or other the whole legal estate, which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

The effect of these sections, according to Mr. Jarman, is, "that trustees whose estate is not expressly defined by the will, must in every case, and whatever be the nature of the duty imposed on them, take either an estate for life, or an estate in fee." 2 Jarm. 195.

Although a devise to trustees to preserve contingent remainders and their heirs may not be restrained (as is usual), expressly to the life of the person taking the immediately preceding estate of freehold, it will be so restrained

by implication if there be no object appearing in the will, which renders its further duration necessary. Thus in *Doe d. Compere v. Hicks*, 7 T. R. 433, where, after a devise to one for life, the deviser limited the estate to trustees *and their heirs*, in trust to preserve contingent remainders, and to permit the tenant for life to take the profits, with remainder over on his decease; and he afterwards gave other life interests, with several remainders over; and after each estate for life he interposed the same estate to trustees *and their heirs*: it was held by the Court of King's Bench, that the estates of the trustees were confined to the lives of the several tenants for lives, and that consequently those in remainder took legal estates, there being no other circumstances in the will to show a contrary intent. "Taking the whole instrument together," observed Lord Kenyon, C. J., "it appears that the testator intended that the trustees should only take during the lives of the several tenants for life, in order to protect the contingent remainders, though the words 'during the life of the tenant for life,' are not inserted in the will in the limitations to trustees. If he did not intend this, all the subsequent remainders to the trustees were absolutely nugatory. The doubt merely arises from the inaccurate penning of the will, which was evidently drawn by a person ignorant of the profession. What I rely upon is this, that taking the series of limitations all together, it appears that the deviser thought that the whole interest in the estate was not vested in the

trustees by the first limitation, because he thought it necessary afterwards to give them the same estate after all the subsequent estates for life." See the remarks of Sir W. Grant, M. R., 12 Ves. 100; *Haddelsey v. Adams*, 22 Beav. 267; *Saunders v. Eppe*, 9 W. R. 69.

With regard to such limitations to trustees occurring in deeds, the Courts will not, with the same facility as in the case of wills, cut them down so as to give the trustees estates only *pour autre vie*. See *Lewis v. Rees*, 3 K. & J. 132; see also *Wykham*, 18 Ves. 395; *Colmore v. Tyndall*, 2 Y. & J. 605; *Fowler v. Lightburne*, 11 Ir. Ch. Rep. 495; *Cooper v. Kynock*, 7 L. R., Ch. App. 398.

Where, however, it appears in a deed that the intention of the parties cannot be otherwise carried out, a limitation to trustees and their heirs will be restricted to an estate *pour autre vie*. See *Curtis v. Price*, 12 Ves. 89; *Beaumont v. The Marquis of Salisbury*, 19 Beav. 198, and cases there cited.

But where in a deed there is a power of appointment under which contingent remainders may be created, an estate in fee limited to trustees will not be cut down to an estate for life. See *Venables v. Morris*, 7 T. R. 342, 437; there an estate was settled by deed and fine to the use of J. M. for life, with remainder to trustees and their heirs during the life of J. M. to preserve the contingent remainders, with remainder to H. M. for life, with remainder to trustees *and their heirs* (generally), to preserve contingent remainders, with remainder

to the first and other sons of J. M. and H. M. successively in tail, with remainder to the appointees by deed or will of H. M., and in default of appointment to her right heirs. It was held that, subject to H. M.'s life estate, the trustees took the fee simple; and Lord Kenyon observed that it was absolutely necessary the trustees should take the fee, for H. M. had a power of appointment; and if in exercising that power she had introduced any contingent remainders, they might all have been defeated if the use were not executed in the trustees.

Although, however, in some other cases arising upon wills there are dicta of Mr. Justice Bailey to the effect that the fact of there being contingent remainders was an argument in favour of trustees taking the fee (*Doe d. Tomkyns v. Willan*, 2 Barn. & Ald. 84; *Houston v. Hughes*, 6 Barn. & Cress. 420), that was not indeed deemed conclusive by Lord Langdale, M. R., in *Heardson v. Williamson*, 1 Keen. 33.

But in a recent case, in which it was not necessary to inquire whether those dicta would bear examination, it was nevertheless laid down that, "in the absence of any contrary or inconsistent intention expressed in the instrument, it may be convenient to hold that if there are words sufficient to give the fee to the devisees in trust, the same shall be held to remain in them if there be any intention in the will which would be better served by its so remaining." Per James, L. J., in *Cunliffe v. Brancker*, 3 Ch. D. 409.

Where, however, there are in the instrument limitations inconsistent

with the intention that the fee should remain in the trustees, the mere preservation of contingent remainders will not be a sufficient reason for their taking it. See *Cunliffe v. Brancker*, 3 Ch. D. 393; there a testator devised a moiety of his real estate to A. and B. and their heirs, to the uses and upon and for the trusts and purposes thereafter mentioned, namely, to the use of A. and B. their executors, administrators and assigns for 120 years, if S. C., the wife of J. C., should so long live, and, subject thereto, to the use of J. C. for life, with remainder to A. and B. and their heirs during his life, upon trust to preserve contingent remainders, with remainder to the use of all the children of J. C. and S. C. who should be living at the decease of the survivor of them, and the issue then living of such of the children as should be then dead, and the respective heirs and assigns of such children and issue as tenants in common (the issue only taking their parents' shares), with divers remainders over. The will contained a power authorizing A. and B. and the survivors of them, and the heirs and assigns of such survivor, to "convey in exchange" any parts of the property, and "to convey upon partition" any of the testator's undivided shares, with a direction that for those purposes it should be lawful for them by deed to revoke the uses, estates, trusts and limitations of the property in the shares so exchanged or conveyed in partition, and by the same or any other deed "to grant and convey" them to the requisite uses,

"or for the purposes aforesaid to limit, appoint, or declare such uses as should be necessary." J. C. died in the life of S. C. It was held by the Court of Appeal, affirming the decision of Sir G. Jessel, M. R., that the intention of the testator clearly was to create a succession of legal limitations in settlement, and that the Court could not hold the legal fee to be in A. and B. merely because if it was not in them the contingent remainder to the children had, in the events which had happened failed, for want of an estate to support it." "It is said," observed James, L. J., "that Lord Cottenham, in *Rackham v. Siddall* (1 M. & G. 607), held that a limitation of a term to trustees in the particular will before him did not prevent the trustees from having the legal estate in fee. But in that case the legal estate had been in the plainest words limited to them in fee, and he put it expressly on the ground that there were two plainly inconsistent devises, and he chose the first. To apply that case, or the dicta of Mr. Justice Bailey, to the case before us, we should have to hold generally that wherever there is a devise to a man and his heirs to uses, and there is in the will a contingent remainder unprotected, the legal fee remains in him, making every limitation equitable in order to give protection to such remainder. We could not, and would not, so hold, if we thought the rules of law as to particular estates and contingent remainders reasonable and beneficial; and so long as the legislature retains them, we are bound to act

as if they were most reasonable and beneficial. We could not so hold without expressly overruling the case of *Festing v. Allen* (12 M. & W. 279; 5 Hare, 573), in which the point was apparently thought unarguable by most of the counsel engaged, in which it was argued by one counsel, and was put aside as not worthy of serious consideration by the Judges at common law and equity; and the case of *Festing v. Allen* has been, from the time it was pronounced, regarded as one of the leading authorities in real property law." See also *Brackenbury v. Gibbons*, 2 Ch. D. 417.

The legislature has only recently interfered to prevent the failure of contingent remainders, in consequence of there not being in existence an estate of freehold when they became vested. See 40 & 41 Vict. c. 33, where it is enacted that "Every contingent remainder created by any instrument executed after the passing of this act (2nd August, 1877), or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or, other executory limitation."

8. *As to Uses not executed by the Statute.*

Copyholds are not within the Statute of Uses (Co. Cop. 54; Cro. Car. 44; 2 Ves. 257), and at law copyholds can only be transferred by means of a surrender into hands of the lord, so that he may admit the person in whose favour the surrender is made, the surrender and admittance being entered on the rolls of the Court. Any uses, however, declared upon a surrender, are now binding directions upon the lord, and unfettered by the rules of common law, may be made subservient to all the various limitations (*Boddington v. Abernethy*, 5 Barn. & Cress. 776) and powers (*The King v. The Lord of the Manor of Oundle*, 1 Ad. & Ell. 283; 3 Nev. & Mann. 484) to which, as we have before seen, freeholds are subject, the legal tenant of the copyholds being trustee for the persons having equitable interests. *Lewis v. Lane*, 2 My. & K. 449.

Leaseholds, or terms of years and other chattels, are not transferable under the Statute of Uses, because the statute is considered only to be applicable when any person or persons stand "seised" to the use of another, the word "seised" being a technical expression, not having reference to chattel interests. Thus if leaseholds were assigned to A. to the use of B., the legal estate would remain in A. who would be trustee for B., although if it had been a freehold estate, as we have already seen, the legal estate by force of the statute would have vested in B.

Much inconvenience arose from chattel interests not being within

the Statute of Uses, especially where on the appointment of a new trustee of leaseholds, in the place of one who had died or was about to retire; for the continuing or surviving trustees could not, as in the case of freeholds, by one deed transfer them to releasees to the use of themselves and the new trustee; but they must first have been transferred by one deed to a third person, who by another deed afterwards transferred them to the old and new trustees. See 5 Martin's Convey, 275, 284.

This inconvenience has been to a great extent, if not wholly, remedied by 22 & 23 Vict. c. 35, s. 21, which enacts, that "any person shall have power to assign personal property, now by law assignable, including chattels real, directly to himself and another person or other persons or a corporation, by the like means as he might assign the same to another."

9. *As to Trusts since the Statute 27 Hen. 8, c. 10.*

It was doubtless the intention of the legislature, by the Statute of Uses, to prevent the creation of equitable interests, by joining the legal to the equitable estate. This intention, however, was entirely overthrown by the decisions of the common law judges, as in *Tyrrell's Case*, that there could not be "a use upon a use;" that is to say, if land were conveyed by a deed operating by transmutation of possession to A. and his heirs, to the use of B. and his heirs, to the use of C. and his heirs, they held that the statute would execute the use in B. but would not go any further,

and consequently that C. could take no interest under the statute. So if there was a deed operating without transmutation of possession, as, for instance, in *Tyrrell's Case*, a bargain and sale by A. to B. to the use of C., here as B. had the first use, to which by the operation of the statute the seisin of A. was attached, the Courts of common law, considering that the virtues of the statute were exhausted, held that B. took the legal estate and C. took nothing. As, however, it was clear that C. was intended to take the beneficial interest, the Courts of equity, upon a bill being filed, held, that B. was only a trustee for C. The result of such decisions was, that the distinction between legal and equitable ownership, which existed before the statute, was again introduced. And "by this means," Lord Hardwicke has observed, "a statute made upon great consideration, introduced in a solemn and pompous manner, by this strict construction, has had no other effect than to add, at most, three words to a conveyance." 1 Atk. 591.

Lord Hardwicke's observation, if confined merely to the intention of the framers of the act to suppress the distinction between the legal and equitable estates, is correct; but he might have added that one important effect of the act still remained, viz. that by which the legal estate was, as we have seen, endowed with all the flexible qualities of the use.

The *uses* upon which the statute operated retained their original name, those upon which the statute did not operate were termed *trusts*; of the law relating to which a few

observations only will be made, as it comes within the boundaries of equity jurisprudence, and has already been illustrated at considerable length in the Leading Cases in Equity.

Trusts are of different kinds: the first *general*, as where the legal estate merely is vested in the trustee, and the cestui que trusts is in equity entitled to the rents and profits, and has power to dispose of the lands. The second *special*, such as a trust to accumulate, to sell, and distribute or convert into other funds, with or without the consent of the cestui que trust. And *thirdly*, all trusts may be divided into executed or executory trusts.

As a general principle in dealing with trust estates Courts of equity are governed by the same rules as Courts of law are, with respect to legal estates. Thus trust estates, whether they be freehold, copyhold, gavelkind or borough-English, have the same descendible properties as if they had been legal estates of lands of such tenures. Sand. Uses, 270.

So, likewise, trusts of leaseholds devolve in the same manner to the personal representatives as legal terms. *Hunt v. Baker*, 2 Freem. 62.

Upon the same principle, trust estates are in equity assignable. *Warmstrey v. Tanfield*, 1 Ch. Rep. 29; 2 L. Cas. Eq. 724, 5th ed.

Upon the same principle it was held, that a husband might be tenant by the curtesy of trust of inheritance (*Watts v. Ball*, 1 P. Wms. 108; *Chaplin v. Chaplin*, 3 P. Wms. 234; *Casborne v. Scarfe*,

1 Atk. 603 ; 2 Jac. & W. 194, App. No. II.) ; and, by analogy, the wife ought to have been held entitled to dower of a trust estate ; however, by a mistaken notion of convenience to purchasers, it was held that she was not so entitled (*Radnor v. Vandebendy*, Show. P. C. 69). This departure, however, from the correct principle has been remedied by the legislature ; and now a widow, if married after the 1st January, 1834, is dowerable out of her husband's trust estates. 3 & 4 Will. 4, c. 105, s. 2.

As to the escheat and forfeiture of trust estates, see post, note to *Attorney-General v. Sir George Sands*.

Although the old Statutes of Limitation (32 H. 8, c. 2, and 21 Jac. 1, c. 16) did not expressly extend to proceedings in equity, nevertheless Courts of equity, as between *cestui que trust* and *strangers*, considered themselves by analogy bound by those statutes (*Smith v. Clay*, 3 Bro. C. C. 639, n. ; *Hovenden v. Lord Annesley*, 2 S. & L. 629) ; but now Courts of equity act not merely by *analogy*, but in *obedience* to the new Statutes of Limitations (3 & 4 Will. 4, c. 27 ; 37 & 38 Vict. c. 57). See 1 Y. & C. Exch. Ca. 439, 440.

Where there is a notional conversion of land into money or money into land, the land or money, differing in this respect from the legal estate, will, in equity, partake of all the qualities of the property into which it is so converted. See *Fletcher v. Ashburner*, 1 L. Cas. Eq. 896, 5th edit.

As to trusts executed and execu-

tory, see note to *Shelley's Case*, post, and *Lord Glenorchy v. Bosville*, 1 L. Cas. Eq. 1, 5th edit., and note.

By 29 Car. 2, c. 3, s. 7, "all declarations or creations of trusts or confidences of any *lands, tenements* or *hereditaments*, must be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing ;" and by the 9th section it is enacted, "that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise."

As the statute does not extend to mere personality, trusts thereof may be declared or created by parol. *Nab v. Nab*, 10 Mod. 504 ; *Fordyce v. Willis*, 3 Bro. C. C. 587 ; 1 P. Wms. 9 ; *MacFadden v. Jenkyns*, 1 Hare, 458.

There is no particular form required for a declaration or creation of a trust (Sand. Uses, 315) ; a mere term of request or recommendation, if the subject and object thereof be precisely stated, will create a trust. *Harding v. Glyn*, 2 L. Cas. Eq. 962, 5th ed.

Resulting and constructive trusts are exempted from the operation of the Statute of Frauds (see 29 Car. 2, c. 3, s. 8), which consequently remain upon the same footing as before the passing thereof.

For instance, constructive trusts, arising from a person purchasing with notice of an equity (*Le Neve v. Le Neve*, 2 L. Cas. Eq. 32, 5th edit. ; *Mackreth v. Symmons*, 1 L. Cas. Eq. 324, 5th edit.), and upon dealings by a person with another

towards whom he stands in some fiduciary relation (*Fox v. Mackreth*, 1 L. Cas. Eq. 123, 5th edit.; *Keech v. Sandford*, Ib. 46), or resulting trusts, as upon the purchase by one person in the name of another (*Dyer v. Dyer*, Ib. 223), and upon the failure of the purposes for which conversion has been directed (*Ackroyd v. Smithson*, Ib. 949) will arise, although there be no declaration in writing respecting them.

The law relating to trusts, by which a great proportion of the property in this country is regulated, far exceeds the law of uses, from which it sprung, both in bulk and importance. It has from time to time been moulded into its present shape by our equity judges, and though not free from defects, the evils which Lord Coke and other common law judges anticipated

would arise from them have not been realized. On the contrary, "by steadily pursuing from plain principles trusts to all their consequences, and by some assistance from the legislature, a noble, rational and uniform system of law has since been raised. Trusts are made to answer the exigencies of families, and all purposes, without producing one inconvenience, fraud or private mischief, which the Statute of Henry 8 meant to avoid." 1 Wm. Blacks. 160. As to the law of trusts, see Lewin on Trusts and Hill on Trustees.

It may be here mentioned that the execution of trusts charitable or private are, by the Judicature Act, 1873 (36 & 37 Vict. c. 66), assigned to the Chancery Division of the High Court. See sect. 34, sub-s. 3.

EDWARDS *v.* SLATER.*Pasch. 17 Car. II. in Scaccario.*

[REPORTED HARDR. 410.]

POWERS—DIFFERENT KINDS OF—THEIR EXTINGUISHMENT AND SUSPENSION.]—*A. B., by fine, settled lands to the use of himself for life, with a proviso, that if he should make a jointure on his wife, and a lease for thirty-one years, to commence after his death, for raising portions for his daughters, that then the comusees of the fine should stand seised to those uses; and limited remainders over in tail, and the reversion to himself in fee. Afterwards he made a jointure pursuant to the power, and then bargained and sold the lands by deed enrolled in trust to raise portions, &c., and afterwards took back a reconveyance from the bargainees by feoffment. He then made a lease for thirty-one years, to begin after his death, to raise portions for two of his daughters, and he and his wife levied a fine sur conusance de droit. A. B. afterwards died. It was held by the Court of Exchequer, dissentiente Turner, B., that the power to lease for thirty-one years was not destroyed by the bargain and sale or the reconveyance; and that although the tenant for life by that bargain and sale passed away his life estate and his reversion, yet it did not touch the estates tail; and that, till the remainder in fee came into being, the power was collateral, and in gross quoad the remainders in tail, which were precedent to it; and that, consequently, the entry of a person by the direction of the lessee for thirty-one years was lawful.*

IN *ejectione firmæ*, upon a special verdict, the case was thus, viz.—A man settled lands by fine to the use of himself for life, with a clause in the deed of uses to this effect; that if he should make a jointure to his wife, and make a lease for thirty-one years, *to commence after his death*, for the raising of 3,000*l.* for his daughters' portions,

that then the conusees should stand seised to those uses: and limited divers remainders over in tail, the reversion in fee to himself. Afterwards he made a jointure pursuant to this power, and then he bargained and sold the lands to other persons in fee, by deed enrolled, in trust to raise portions, &c.; the bargainees afterwards reconveyed the lands to him in fee by feoffment: then he made a lease for thirty-one years, *to begin after his death*, for the raising of 3,000*l.* for the portions of two of his daughters only, and he and his wife after that levied a fine *sur conusance de droit*, &c., and afterwards he died. A person by the direction of the lessee for thirty-one years entered, and whether his entry were lawful or not was the question.

Mr. Trevor, for the plaintiff, made several points in the case.

First, he urged that, by the bargain and sale, the tenant for life had departed with all his estate, so that afterwards he had no such power, as to make a lease for thirty-one years. And upon this head he considered *quid operator* by a bargain and sale, as well before as after the Statute of Uses (27 Hen. 8, c. 10).

Before the statute a fee simple would have passed without the word "heirs," and all the estate that the bargainor had, as appears, by 27 Hen. 8, 5; Dyer, 225. And since the statute nothing is left in the tenant for life, as appears, by *Seymour's Case*, 10 Co. 95*b*; and see post. So if tenant in tail bargain and sell *totum statum suum*, *Dimmock's Case*, Hob. 136; *Smith's Case*, 2 Bulstr. 163; 1 Cro. 896 (a); 1 Cro. 157. And the powers in this case arise and pass out of the interest and estate of the tenant for life.

Secondly, by the reconveyance to the tenant for life in fee, he is now in of a new and other estate, and consequently his power lost and gone; see 9 Hen. 7, 1, the case of a tenant by the curtesy, who had made a feoffment in fee upon condition, and entered for the condition broken: he was held not to be in after his re-entry, in privity of his former estate of tenant by the curtesy; see *Digges's Case*, 1 Co. 174; and 5 Hen. 7, 11; 11 H. 4, 2; Co. Litt. "Homage Ancestral;" Co. Litt. 252; that privity of estate is destroyed by a feoffment.

Thirdly, he insisted, that the powers here were repugnant, unreasonable, inconsistent and contrary to law, viz., that the tenant for life should have both these powers to make a jointure, and a lease for

(a) *Sir Christopher Heydon's Case*.

thirty-one years to commence after his death; that the first of these destroyed the latter; both the jointure and the lease being to commence in interest at one and the same time: as if a lease for years be made, and afterwards another lease be made to begin at the same time, if the second lease be without deed, it is void; and if it be by deed, it is good only for the surplusage of time, if there be any, unless the reversion pass by attornment, as appears; 3 Cro. 160; 4 Jac. *Starkey and Dryop's Case*, Plow. Com. 432; *Fitz-Williams's Case*, 6 Rep. 32. Likewise, the power here is not pursued, if it were originally good; for the lease here made is only for the raising of portions for *some* of his daughters and *not* for all; and the power was executed before, by making a conveyance to other persons for the raising of portions, viz., by the bargain and sale. And although a power be not duly executed, yet if a man has ventured on such or such a course and method of executing it, and have missed, he shall not afterwards execute it *de novo*. As if an office or inquisition be taken before commissioners, and they have not followed their commission, they shall not take upon them to find anew; see 14 Edw. 4, 2; 32 Hen. 6, 10; *Digges's Case*, 1 Co. 157. An use once revoked cannot be revoked again, though the words are *toties quoties*. So of a recovery in value, 14 Edw. 4, 2, Recovery in Value, 32. Besides, this is an hypothetical power, it begins with an "if," which is not direct and positive; and may be wholly defeated and destroyed by the destruction of the estate to which it was annexed, as in the case of accruers, *Lord Stafford's Case*, 8 Co. 73; and Plow. Com. 481, 489, which, if once they be disturbed and displaced, will never revive again.

Fourthly, here the last fine has barred the lease by non-claim; for the first conusees have not made an entry to preserve it, but, as the jury has found, another person has entered by their direction, which does not amount to a command. And a claim to avoid a fine must be precise and certain, see Litt. tit. "Continual Claim;" 3 Cro. 31; Bract. lib. 5, fol. 436; Flet. 444. See More's Rep. 450, concerning the manner of making claim to avoid a fine; and that it must be certain and precise, see 3 Cro. 577; *Fitzhugh's Case*, 3 Leon. 221; *Margaret Podger's Case*, 9 Co. 104.

Serjeant *Newdigate*, for the defendant.—Here is a good power, both to make a lease and to make a jointure, and the one does not

destroy the other. Each arises out of the primitive estate, and not out of the estate of the tenant for life, and is a power collateral to his estate, and therefore is not destroyed by a conveyance made by him, as was adjudged in *Phitton's Case*, that a lease and release destroyed not such a power, and especially when the tenant for life passes away only such an estate as he may lawfully pass, and by a bargain and sale no more passes from him than he may lawfully convey, nor does such a conveyance make any displacing of estates.

Objection: It is unreasonable to have an estate charged with two such powers. Resp.: *Cujus est dare ejus est disponere*. And they may well stand together, and depend one upon the other; and, perchance, the jointure may determine in the life of the tenant for life, or within a short time after his decease, and then the lease will be good for the residue of the term, see 2 Cro. 348. And in *Berry and Riche's Case* (b), in the Common Pleas, it was lately adjudged, that if a man has a power to make a lease for years, where there is another lease in being, there if he makes a lease to commence in presenti, the power is well executed, and the second lease shall continue as long as it may, taking effect in possession, after the determination of the first lease. See More's Rep. 618. And a direction to enter is here sufficient; for *quod quis facit per alium facit per se*. And a command precedent, or an assent subsequent, in such cases is sufficient, as in *Margaret Podger's Case*, 9 Rep. 104; Litt. 416; Co. Litt. 282; Dyer, 331. And in a special verdict, at least, such finding shall be good. See *Fulwood's Case*, 4 Co. 64; *Earl of Shrewsbury's Case*, 9 Co. 42.

Hale, C. B.—Here have been many material questions stirred on the plaintiff's behalf. First, whether these powers are well raised? And it should seem that they are, because the estates to be limited by them shall take effect according to their precedency; and there may very well be a residue of the term for years, left unexpired after the determination of the jointure; which suffieeth. Secondly, whether or not the power be well executed, as to the lease for thirty-one years? And the power seems to be well executed by the second conveyance, though not by the first, viz., by the bargain and sale; because it was neither made for a jointure nor was it a bargain and

(b) This is probably intended for *Berry v. White*, since reported Bridg. Rep. by Ban. 82.

sale for thirty-one years, but passed away all his estate and his reversion in fee; and so was not pursuant to his power, and therefore the power was not well executed by that conveyance. Thirdly, whether here be a good claim made to avoid the fine? But there needs no claim in the case, because this lease is only a future interest, and therefore not touched by the fine. *Saffyn's Case*, 5 Co. 123. And if it were requisite, an entry by his direction, that ought to enter, which is found here, suffices in a special verdict. Fourthly, whether this bargain and sale have destroyed the power. Fifthly, whether it be destroyed by the reconveyance? As to these two points, it will be hard to say, that the reconveyance has destroyed it; because it is not the act of the party that had the power. And it is hard to say, that the bargain and sale has done it; because the power is collateral, and the estate to be limited does not arise out of the tenancy for life, but out of the first estate. It would be much clearer and a stronger case, if the tenant for life had a power generally to make a lease for years, to say, that the lease should arise out of his estate, than this of ours is, in which the lease for years is not to commence till after the death of the tenant for life, and therefore cannot be incident to his estate. And in Noy's Reports, it is held, that a covenant to stand seised in fee does not destroy such a power. Though that may be questionable, because the whole estate is there disturbed; whereas the bargain and sale here displaces nothing. And if the bargainer had a power of revocation, he might well execute it after the executing this conveyance. But he said he would not deliver any opinion in the case. Et adjournatur.

Afterwards in Easter Term, anno 19 Car. 2, the Court delivered their opinions seriatim.

Rainsford, B.—The sole question here is, whether this lease for thirty-one years be well made or not? The jointure is out of doors, for that is barred by the fine, and the collateral warranty in the fine does not bar the issue in tail, because he is under age. So that the question is single, and concerns the lease for years *only*, viz., whether the power to make a lease for thirty-one years, to commence after the death of the tenant for life, be well executed or not? And here are two things to be considered;—first, the bargain and sale, and the consequences thereof; secondly, the reconveyance by feoffment, and

the consequences of that. As for the bargain and sale, that does not displace any remainders limited to other persons. So that notwithstanding it, the power remains, and nothing is passed away by it, but what the tenant for life might lawfully pass. Secondly, the reconveyance by feoffment, that indeed divests all the remainders, and makes the feoffee to be in of a new estate, *Chudleigh's Case*, 1 Co. 113; *Seymor's Case*, 10 Co. 95a. And it may be doubted, whether or not the power be not thereby suspended till the estates be recontinued by an entry? but I hold it is not. First, it is collateral to the estate of the tenant for life, not being to commence till after his estate be determined, and therefore it cannot be destroyed by a feoffment. *Albany's Case*, 1 Co. 107; and *Digges's Case*, *Ib.* 157. And it is the same case then as where the power is in a stranger, *Whitlock's Case*, 8 Co. 69. And the estate here is revested by a re-entry. And if a tenant for life assigns over, that does not obstruct his power of making a lease, to commence after his death; for a collateral power remains notwithstanding the estates be disturbed; as in 15 Hen. 7, 11, *Albany's Case*, and *Digges's Case*. A power given to executors or to feoffees to sell, remains after the estate is disturbed. Secondly, the estate here is recontinued by the entry of the tenant in tail, after the death of the tenant for life, which is found here by the verdict.

Objection: The power cannot be said to be collateral with respect to the remainder in fee, which was in the tenant for life, and passed by the bargain and sale. Resp.: There is a diversity betwixt a condition and a power. A condition cannot be apportioned, but a power may, for one is not favoured in law as the other is: see Co. Litt. 215, 237; Hob. 312. And as long as the estates tail remain, the power shall be deemed collateral, but not after they are determined. In this case they continue as yet. And he concluded *pro defendente*.

Turner, B.—There are two questions in this case. First, whether this power be well created? And I hold it is. Secondly, whether it be well executed? And I hold it is not, because it is destroyed by the bargain and sale; nor is it collateral; if it were, it would not be destroyed, according to *Albany's Case*, and *Digges's Case*. But here it savours of the land. If a feoffor had reserved such a power originally, it would not have been held to be collateral. And though

the land do not pass from him that has such a power, yet, if such person have an estate in the land, the power is not collateral. Co. Litt. Cond. last leaf. And it might be mischievous if the power were held to be collateral; for then if the tenant for life should grant a rentcharge, and afterwards make a lease, &c., he would avoid his own act. But because it savours of the land, it is gone by the bargain and sale, and passes together with the land, and amounts to a confirmation by reason of the estate in fee expectant. As in *Dutton v. Ingram*, 15 Jac. ; 2 Cro. 427; if tenant in tail, remainder to him in fee, grant a rent in fee, the rent continues after the expiration of the estate tail, and the grant works by way of confirmation, by reason of the remainder in fee; and the grant purports an estate in fee, though it be not really such; so here. And he concluded pro querente.

Hale, C. B.—The fine and non-claim do not bar this future interest, not being here displaced and turned to a right. And the powers of making a jointure and a lease, as aforesaid, are consistent; for during the continuance of the jointure, the lease shall not take effect in point of interest, but shall go on in time, and the residue of the term that remains unexpired, after the death of the jointress, shall take effect in interest; and no more. The only question then is, whether or not the power to make a lease for thirty-one years be destroyed? First, powers to raise estates are either simply collateral (as where a party that has such power has not, nor ever had any estate in the land: as where such power is reserved to a stranger, and there it cannot be destroyed by such stranger, because it is no more than a bare nomination), or not simply collateral: and these latter are of two sorts. First, appendant and annexed to the estate. Secondly, in gross.

A power of the first sort is, where tenant for life has a power to make leases for one and twenty years or three lives. Such a power is not simply collateral, for if such a tenant charge the land with a rent, and then execute his power, the charge shall not be defeated whilst he lives, *Latche's Rep.* So if he had before covenanted to stand seised to the use of another; because the power in that case is annexed to the estate.

But where the power does not fall within the estate, as here, the

tenant for life has a power to make an estate, which is not to begin till after his own estate determined, such power is not appendant or annexed to the land, but is a power in gross; because the estate for life has no concern in it. And yet such a power may by apt words be destroyed by release, or by a fine or feoffment, which carry away and include all things relating to the land. But an assignment of *totum statum suum*, or other alteration of the estate for life, does not affect such a power; because it is a power in gross.

Now we are to consider whether, as this case is, the power be destroyed? Two things have been urged to prove the power gone and destroyed. First, the bargain and sale. Secondly, the feoffment and reconveyance to the tenant for life.

In the first of these objections there are two things. First, the tenant for life has passed away his estate for life. Secondly, he has passed away his reversion in fee, by bargain and sale. Resp. to the first objection, the bargain and sale does not touch the remainders in tail; but the estate for life, and the remainder in fee only. And the power here is not annexed to the land, but is a power in gross. If the tenant for life in this case had a power of revocation, and should make a lease, that would not destroy his power, because no estate is displaced by it. And in Hughes's Reports, in 27, 28 Eliz. Cas. 40, a bargain and sale does not pass away, nor affect a contingent use in the bargainor; but a feoffment or a fine would transfer it. And for answer to the second objection, grounded upon the remainder in fee being conveyed, I hold that if the remainder in fee should come in being, the bargainee would not hold the land charged with this lease, because the interest of the remainder in fee would support it, and it is a power annexed to that estate; but till then it is a collateral power, and in gross quoad the remainders in tail, which are precedent to it. But that is not our case; for the question here is not, how the law would have been in case the remainder in fee had been the only estate in being.

Objection: If the fee simple be discharged, then the mesne estates are so too: As in case of a seignory or condition, if the fee be discharged, the mesne estates are so too. Resp.: A power is apportionable, but a seignory or a condition is not. As a warranty, though it be destroyed as to the fee simple, yet it continues annexed to the mesne estates. This was *Alderman Garraway's Case*; a lease for a

hundred years being made, the reversion was granted for life, and the lessee granted his estate to him in the reversion in fee; and it was held, that the lease for years was not destroyed by meeting with the fee, because by possibility the lease for life might outlast the term. So here, there is a possibility that the reversion in fee may come in possession; and yet the power is not destroyed by it. So if a grantee in fee of a rent purchase a remainder in fee of the land depending upon an estate tail, the rent is not thereby extinct; because there is but a possibility of the remainder in fee coming ever into possession. *Cooke v. Bromehill*, Noy, 66, Pasch. 37 Eliz. No more, in this case, shall the possibility of the remainder in fee coming into possession destroy the power.

A second question is, whether the feoffment has destroyed it, or not? And I hold not; because it never was in the feoffor, nor reserved to him. But there is no feoffment here found, but only a conveyance from the bargainee to the tenant for life, with these words, viz. "grant, bargain, sell, release, enfeoff and confirm." But admitting the power not destroyed, *causa qua supra*; yet here is a forfeiture of the estate for life, and a displacing of all the remainders.

Object.: The power then is suspended.

Resp.: No; because here William had a right to make such a lease, which is sufficient to support the power. As if tenant for life, remainder to the right heirs of J. S. be disseised, the right remaining in the tenant for life is sufficient to support the contingent remainder; and by the entry of tenant for life, it is reduced together with the estate. So here, if the tenant for life had been disseised, and then had made such a lease, and had entered, this would have reduced the right to an actual estate. And here it is found, that the tenant in tail entered, which reduceth all the estates and interests, and by consequence the lease for thirty-one years. And he concluded pro defendente.

In the important and frequently cited case of *Edwards v. Slater*, the question was very fully and ably discussed by Hale, C. B., how far powers of different kinds are suspended or extinguished by the acts

of the donee. The decisions upon the subject are numerous, and by no means free from difficulty; but the principle upon which they either do or ought to proceed is plain, and, if borne in mind in considering the

various cases which arise, will go far to enable us to arrive at a correct conclusion upon them.

The leading principle in determining whether a power is either suspended or extinguished seems to be this, that the intention of the donee of the power in an appointment, whether expressed or implied, should be carried into effect, so far as it does not derogate from any interest of his own which he may have previously granted away out of the estate upon which the power operates. If, previous to the execution of the power, the donee has granted away a part of his estate, then there will be to that extent a suspension; if he have granted away the whole of his estate, then there will be an entire extinguishment of his power.

This principle, however, is only applicable, as will be hereafter more fully shown, where the donee of the power has also an interest in the estate.

In examining this subject, and the application of the principle before laid down, it becomes important to consider what are the different kinds of powers; and in so doing we cannot adopt a better classification than that of Hale, C. B., in the principal case, viz.—I. Powers simply collateral; II. Powers not simply collateral: which last are subdivided into—First, Powers appendant and annexed to the estate; Secondly, Powers in gross.

I. *As to Powers simply Collateral.*

One of the instances given by the Chief Baron in the principal case, of

a simply collateral power to raise estates, is where a party has not, nor ever had, any estate in the land; and, being a mere stranger, has a power limited to him, ante, p. 374.

Another instance is where a stranger has power to revoke a settlement and appoint new uses to other persons designated in the deed. 1 Sugd. Pow. 42.

This species of power cannot, as is laid down in the principal case, be destroyed. Thus, a mere power, without any interest, given to an executor or stranger to sell land, cannot be extinguished or destroyed either by the feoffment or release of the donee (*Tippet v. Eyres*, 5 Mod. 457; 2 Vent. 115; *Quick v. Ludborrow*, 3 Bulst. 29; *Albany's Case*, 1 Co. 112; *Grange v. Tiving*, Bridg. by Ban. 111; the fifth resolution in *Digges's Case*, Moo. 605; *West v. Berney*, 1 Russ. & My. 434; *Willis v. Shorral*, 1 Atk. 474, 475, 476), of a stranger or of the owner of the land. *Willis v. Shorral*, 1 Atk. 474.

But the implied power which executors have to sell an estate charged by will with payments of debts, though collateral, may it seems be extinguished by a sale under a power given to trustees by the same will. *Hodgkinson v. Quinn*, 1 J. & H. 303; and see *Elliot v. Merryman*, 1 L. C. Eq. 64, 102, 103, 5th ed. But see now 22 & 23 Vict. c. 35 (Property and Trustees Relief Amendment Act), and the comments therein, in 1 L. C. Eq. 104, 105, 5th ed.

It seems that a mere refusal of a man having a bare authority to

execute it will not disable him from executing it at a future period. See the remarks of Pollexfen, C. J., 5 Mod. 458.

Where, moreover, a collateral power, coupled with a duty, is conferred upon trustees, to be executed by them at a fixed period, and after they have come to a judgment as to the conduct of the individual to be affected, they cannot divest themselves of their power, or execute it until the time appointed, nor can they enter into any anterior compact respecting it. *Weller v. Ker*, 1 L. R., H. L. Sco. App. 11.

II. *As to Powers not simply Collateral.*

1. *Powers Appendant and annexed to the Estate.*

A power appendant is where a person has an interest in the estate to which it is annexed, and his power, as will be hereafter shown, can be either *suspended* or *extinguished*, according to the mode in which he deals with such interest.

As to the Suspension of Powers Appendant.

It is said in the principal case, that if a tenant for life has a power to make leases for one-and-twenty years or three lives, and he charge the land with a rent, and then execute his power, the charge shall not be defeated while he lives, because the power is in that case annexed to the estate, ante, p. 374.

Upon the same principle, in the well-known case of *Goodright v.*

Cator, Doug. 460, where Lord Bolingbroke, the tenant for life of an estate, with powers of revocation and new appointment, demised the estate for ninety-nine years, if he should so long live, to secure an annuity, and afterwards revoked the old uses and appointed the estate to trustees upon trust to sell, and the estate was afterwards sold, counsel for Lord Bolingbroke contended, that as he, being tenant for life, had only a qualified or defeasible interest, he could not alien the estate for his own life, discharged from the qualifications which affected it in his hands, viz. the consequences of the power of revocation. It was held, that the demise to secure the annuity was not affected by the revocation and new appointment. "I cannot," said Lord Mansfield, "frame a doubt upon it. Undoubtedly Lord Bolingbroke had a right to do what he did. It is a right which arises out of the nature of his estate. The question is, whether the *same* Lord Bolingbroke who has made this demise, for a valuable consideration, can be authorized to revoke it under any power in any settlement; for, by the power, the revocation must be executed *by him*. If the purchaser did not know of the incumbrance, there was a fraud upon him. But it is found that he knew of it; and therefore the fraud was upon the annuitant." See also *Piers v. Tuite*, 1 Dru. & Wal. 279; *Piers v. Piers*, 2 H. L. Ca. 331; *Hurst v. Hurst*, 16 Beav. 372.

So a lease granted by a tenant for life out of his interest will not

be defeated by a lease made subsequently under a power of appointment. See *Bringloe v. Goodson*, 4 Bing. N. C. 734; remarks by Tindal, C. J.

Again, if a tenant for life of a fund has power to appoint a part thereof for the advancement of his children in his lifetime, he cannot, after having assigned his life interest as a security, be at liberty to lessen that security by exercising the power for advancement. *Noel v. Lord Henley*, McCl. & Y. 306. See also *Stewart v. Marquis of Donegal*, 2 J. & L. 636; *Hinds v. Hinds*, 2 Ir. Ch. Rep. 227.

As, however, a husband takes his wife's property liable to all its incidents, an assignment by him of her life interest, even although she joins therein, is, it seems, liable to be defeated by the exercise or consent to the exercise of a power by her. *Whitmarsh v. Robertson*, 1 Coll. 570.

Although it is clearly right in principle that a person should not be allowed to exercise a power so as to defeat an estate created by himself out of his own interest, yet there is no reason why a power should be suspended beyond the limit of such estate; it would indeed give rise to much inconvenience if a person having granted a lease should not be able, subject thereto, to exercise powers of jointuring or advancement. Thus if a person, having a limited estate in land, with a power of revocation and new appointment, grant a lease and afterwards exercise the power, the lease will not be thereby affected; but, subject to the lease,

the right to exercise the power of revocation and new appointment will not be suspended. See *Yeland v. Fielis*, Mo. 788; *S. C.* 1 Roll. Abr. 473 (K), pl. 3, nom. *Yeoland v. Fellis*; *Bullock v. Thorne*, Mo. 615; *Anon.*, Ib. 612; *Snape v. Turton*, Cro. Car. 472; 1 Ch. Rep. 112; *Lord Mordant v. Earl of Peterborough*, 3 Keb. 305. See also *The Attorney-General v. Gradyll*, Bunb. 92.

Although a tenant for life who has granted a lease out of his life interest cannot afterwards defeat such lease by one subsequently made in execution of a power contained in an instrument of prior date, nevertheless, a lessee under a power cannot set up, by way of defence to an action by a mortgagee under a power given to executors and contained in the same instrument, an estate granted by the tenant for life out of his life interest. See the case of *Bringloe v. Goodson*, 4 Bing. N. C. 726, there an estate had been devised by will to a man for life, with power for him to demise for twenty-one years, and for the executors to mortgage in fee or for years. In 1812, after the testator's death, the tenant for life made a grant to Clement for ninety-nine years, if he should so long live. In 1814 he demised, under his power, for twenty-one years. In 1828 the executors mortgaged the estate for 1,000 years under their power. In an action brought by the mortgagee for rent arising under the lease for twenty-one years, it was held by the Court of Common Pleas, that the lessee could not set up as a

defence, the interest of the grantee for ninety-nine years. "There is," observed Chief Justice Tindal, "no authority in point, and upon principle, we think that there has been *no suspension of the leasing power* given to the tenant for life, so far as regards the grantee of the term under the power to demise by way of mortgage given to the executors; and upon that ground we think such grantee has the immediate reversion in him, and may sue upon the covenants in the lease."

As to the Extinguishment of Powers appendant.

It is clearly established, that where a tenant for life with power of leasing *in possession aliens* his *whole life estate*, the power is thereby extinguished, and cannot afterwards be exercised to the prejudice of the grantee. *Berry v. White*, Bridg. by Ban. 91; and see Doug. 293.

Upon the same principle, where property, whether real (*Penne v. Peacock*, Ca. t. Talb. 41; *Webb v. Lord Shaftesbury*, 3 My. & K. 599) or personal (*Cherry v. Boulton*, 2 Keen, 324), is settled upon such uses or trusts as a man shall appoint, and, in default of appointment, to him absolutely, or to a man for life, then to such persons as he should appoint by *will*, and, in default of appointment, to him absolutely, he may by alienation of the property, extinguish the power.

In similar cases, the power will be extinguished, where the alienation of the estate is affected, not by the act of the party himself but by operation of law. Thus in the case

of *Doe v. Britain*, 2 B. & Ald. 93, a trader being seised of an estate for life, with a general power of appointment, with remainder in default of appointment to himself in fee, after having committed an act of bankruptcy, upon which he was afterwards declared a bankrupt, executed an appointment in favour of an appointee; it was held by the Court of King's Bench, that all his interest having passed to his assignees, the power of appointment was thereby extinguished. See also *Anon.*, Lofft, 71; *Thorpe v. Goodall*, 17 Ves. 388.

But the powers in a family settlement will not be destroyed in such case, where their existence and the exercise thereof do not affect the rights of the creditors to the interest in the property which passed to them by operation of law. This principle was overlooked in the case of *Badham v. Mee*, 7 Bing. 695; 1 My. & K. 32.

That case, however, has since been overruled by the case of *Jones v. Winwood*, 3 M. & W. 653. There lands were settled to such uses as the husband and wife *should jointly appoint*, and, in default of appointment, to the use of the husband for life, then to the use of the wife for life, and then to the use of his sons in succession in tail general, and then to the use of the daughters in tail general, with cross remainders, with remainder to the husband in fee. The husband took the benefit of the Insolvent Act, and conveyed all his interest to the provisional assignee, who afterwards made a transfer to the assignee of the estate; *subsequently* the husband

and wife, in execution of *their joint power of appointment*, conveyed the premises to trustees upon trust, for the creditors of the husband. It was held by the Court of Exchequer, to whom the case had been sent by the Lord Chancellor, that the power of appointment was not destroyed by the conveyance to the provisional assignee, and that the power was well executed so as to pass all interest in the premises, except what had previously passed by the assignment under the Insolvent Debtors Act, viz. the husband's life interest and his remainder in fee. "We cannot," said Alderson, B., "adopt the principle laid down by Sir Jehn Leach (1 My. & K. 32), in affirming the certificate sent by the Court of Common Pleas in *Badham v. Mee* (7 Bing. 695). It is not clear that such was the ground on which that Court made their certificate, the reasons for which were not given by them. We do not think that it is right to translate into words the effect of the appointment under the power, taken in conjunction with the other circumstances, and then to consider whether such limitations could, according to the peculiar rules affecting the transmission of landed property, have been legally inserted in the original deed. The utmost extent to which the principle could be carried (and looking at the principles which govern the execution of these powers, which were originally mere modifications of equitable uses, taking effect as directions to trustees, which bound their conscience, and which a Court of Equity would compel them to perform, it may

be questionable whether even this ought to be done) would be to insert the limitations actually contained in the appointment itself in the original deed, and then to examine whether such limitations would be repugnant to any known rule of law. Now, if we do that in this case, no difficulty would be produced. Here, if the limitation of the estate made by the appointment under this power had been inserted in the original deed, there would have been no incongruity upon the face of that instrument. A fee would have been given to Brown and Benyon, the trustees, and no more. But then, in considering what operation such a deed, good in point of form, will have, the Court looks at the other circumstances, and finding that the insolvent had previously, by an innocent conveyance (for such the assignment under the Insolvent Act must, we think, be considered to be), conveyed away his life estate and his remainder in fee, it adjudges that he cannot, by executing the power, derogate from his own previous conveyance, and concludes, therefore, that the deed does not operate on the estates previously assigned. The result therefore is, that, by executing the power, the insolvent conveys to the trustees all that had not been previously assigned under the Insolvent Act to his assignees. In conformity with this opinion, we shall send our certificate to the Lord Chancellor."

The certificate of the Court of Exchequer, in *Jones v. Winwood*, was afterwards confirmed by Sir L. Shadwell, V. C. See 10 Sim. 150.

In *Hole v. Esteot*, 4 My. & Cr. 187, by a marriage settlement, an estate was limited to the husband for life, and after providing a jointure for his wife, a power was given to the husband and wife, or the survivor of them, to appoint to the children of the marriage, and in default of appointment the estate was limited to such sons and daughters, or such children of deceased sons and daughters of the marriage as *should be living at the death of the survivor of the husband and wife*, with an ultimate remainder to the husband in fee. The husband became bankrupt, and *afterwards* he and his wife made a joint appointment in favour of two of the children of the marriage. The husband then died, and a bill having been subsequently filed by a person claiming under the bankruptcy, for an account of the rents and profits of the settled estate, the wife thereupon executed a separate appointment in favour of the same children. It was held by Lord Cottenham, C., that as the husband was entitled to a life interest, with remainder to himself in fee, in consequence of the estate limited to the children failing for want of a particular estate to support it, and as the interest of the husband, unaffected by any execution of the power, passed to the assignees, he could not by any subsequent joint appointment with his wife deprive them of it. But his Lordship (on this point reversing the decision of the Master of the Rolls, reported 2 Keen, 444) held that the appointment of the wife surviving was good as against the assignees.

In *Lee v. Olding*, 2 Jur., N. S. 580, stock was, by a marriage settlement, settled in trust for the child or children as the husband should appoint, and in default of appointment, in trust for all the children equally. The husband having made an appointment in favour of one of his children, appointed the rest to his other child, who had been a bankrupt but had obtained his certificate before the appointment. It was held by Sir J. Stuart, V. C., that the assignees only took a defeasible title during the bankruptcy and before the certificate, and that, under the power of appointment executed after the date of the certificate, the bankrupt became entitled to the whole fund as against the assignees. And see and consider *In re Vizard's Trusts*, 1 L. R., Ch. App. 588; *De Serre v. Clarke*, 18 L. R., Eq. 587.

But as the destruction as well as the creation and execution of powers depends upon the substantial intention and purpose of the parties, a conveyance *by way of mortgage or to secure an annuity*, by a tenant for life having powers of sale, or powers of leasing in *possession* (although a contrary opinion seems formerly to have been entertained, *Vineent v. Ennys*, 3 Vin. Abr. 432, pl. 10; and *Corker v. Ennys*, Ib.), will not extinguish the powers of sale and exchange (*Tyrell v. Marsh*, 3 Bing. 31; 10 Moo. 305; *Davies v. Bush*, M'Clell. & Y. 28; *Walmsley v. Jowett*, 22 L. T. 279; *Cowgill v. Lord Oxmantown*, 3 Y. & C. Exch. Ca. 369), or the powers of leasing, for by possession in such cases the

receipt of the rents, and not actual possession is intended. See *Ren v. Bulkeley*, Doug. 291, in which case Lord Onslow, being tenant for life of an estate with power to grant leases *in possession* for twenty-one years at the best rent, conveyed his life estate to trustees to pay an annuity during his life, and the surplus to himself. It was held by Lord Mansfield, C. J., that the power was not thereby extinguished, but that Lord Onslow might still grant a lease according to the terms thereof. "The creation, execution, and destruction of powers," said Lord Mansfield, "depend on the substantial intention and purpose of the parties. It is said—1. That the grantor in this case was not in possession, and that it was necessary he should be, to execute the power. But I think possession here means the receipt of the rents and profits, which were applied to his use. If *actual* possession were necessary, a leasing power could never be executed where the land is in the hands of a tenant. 2. It is contended, that by granting away his life estate, he extinguished the power. Certainly, where the whole life estate is conveyed away by *the intention* of the parties, the power must be at an end, and cannot be afterwards exercised to the prejudice of the grantee. But the conveyance here was only to let in a particular change, subject to which the rents and profits still belonged to Lord Onslow; and the lease could not prejudice the security, nor the remainderman, for the best rent must be reserved. It would therefore be contrary to

the intention of all the parties, to hold that the power was extinguished."

A fortiori the power of leasing given to a tenant for life would not be extinguished by a conveyance by way of mortgage or security of the life interest, where in the mortgage deed or security there is a *reservation* of the power of leasing; see *Long v. Rankin*, Sugd. Pow. App. No. 2. Lord Eldon, however, in that case, which came before the House of Lords, desired, that it might not be understood that he had given any opinion whatever with regard to *Ren v. Bulkeley*.

Nor will a power of consenting to a sale by trustees be extinguished by a tenant for life aliening his life interest, if there is an *implied* reservation of his power to consent, as, for instance, from its appearing in his conveyance to the purchaser that the subject thereof was to retain its convertible quality, which it could only do consistently with the retention of the power. Thus, in the case of *Warburton v. Farn*, 16 Sim. 625, the trustees of a marriage settlement had power to invest the trust funds in land, and afterwards to resell the lands *with the consent of the tenant for life*. After the trustees had invested part of the funds in land, the tenant for life conveyed his interest under the settlement, to a purchaser; by the description of all his life and other estate and interest in all the monies, stocks, funds and securities, and messuages, tenements and hereditaments, into which the money, stocks, funds and securities were, or *at any time thereafter might be, converted*

and changed. It was held by Sir L. Shadwell, V. C., that the power of the tenant for life to consent to a resale of the land was not destroyed by the alienation of his life interest. "For," said his Honor, "the conveyance of that interest to the purchaser shows, that the contract between him and the purchaser was that the property which was the subject of the contract should retain its convertible quality; which it could not do unless the tenant for life retained his power of consenting to an exercise of the power of sale by the trustees."

And although no such power should be either expressly or impliedly reserved upon the alienation of the interest of the tenant for life, the power may still, with the concurrence of the alienee of the life interest, be exercised, inasmuch as the only person who could allege that such exercise was in derogation of a previous grant by the tenant for life, is the party consenting thereto. *Alexander v. Mills*, 6 L. R., Ch. App. 124.

And it appears to be immaterial whether the power was created by the tenant for life himself as settlor or by another person. *Alexander v. Mills*, 6 L. R., Ch. App. 133.

Where the alienation of the interest of the tenant for life takes place by his bankruptcy, a power of sale given to trustees over the settled estate at his request will not be extinguished, and a good title may be made by the exercise of the power by the assent of himself and his assignees in bankruptcy, or if the latter have sold the life interest, then with the

assent of himself and the alienee. See *Holdsworth v. Goose*, 29 Beav. 111. There a power of sale over a settled estate was given to trustees, at the request and by the direction of the tenant for life. The tenant for life became bankrupt. It was held by Sir J. Romilly, M. R., that the power was not extinguished, but that with the assent of the tenant for life and his assignees, a perfect title could be made under the power. See also *Eisdell v. Hammersley*, 31 Beav. 255; *Simpson v. Bathurst*, 5 L. R., Ch. App. 193, 200, 202; *Leceire v. Beaudrey*, 21 W. R. 487.

In *Leigh v. Lord Ashburton*, 11 Beav. 470, a power of sale was given to trustees with the consent of the tenant for life. Judgments were entered up against the tenant for life, and the question raised upon a demurrer was, whether the trustees could sell without the concurrence of the judgment creditors. Lord Langdale, M. R., however, held that the point could not properly be decided upon demurrer.

The power of sale in a mortgage deed would, it seems, be extinguished, if on a transfer of the mortgage there were a clear and unambiguous contract, either in the recitals or the operative part of the deed of transfer, that the power was never to be exercised. See remarks of Mellish, L. J., in *Boyd v. Petrie*, 7 L. R., Ch. App. 394.

But a power of sale in a mortgage deed will not be extinguished by a transfer (in which the mortgagor concurs) together with the benefit of all provisoes, although the deed of transfer contains a covenant for payment of a different

sum on a different day. *Young v. Roberts*, 15 Beav. 558. But if there were no assignment of the powers and provisoes contained in the first mortgage, it would be evidence of an intention that they should be extinguished. *Ib. Curling v. Shuttleworth*, 6 Bing. 121.

Where it appears from the scope of the deed of transfer that the whole of the existing securities should be kept alive as a collateral security, if necessary, for the purpose of the security intended to be effected by the deed itself, a mere recital in the deed of transfer, "that the power has not been, and is not intended to be, exercised," will not extinguish the power, because such words may be understood to mean "that the power has not been exercised, and it is not intended to be exercised at present, or for a certain time, or in any manner inconsistent with the stipulations of this contract or with the intention of the parties." *Boyd v. Petrie*, 7 L. R., Ch. App. 383, 393.

Although the whole estate of the donee of powers of sale and exchange is conveyed by him, yet, if it is by way of re-settlement, and the prior uses are re-limited, and the prior powers of sale and exchange saved and confirmed, those powers may still be exercised, although present powers of sale and exchange are reserved by the new settlement to different persons. 1 Sug. Pow. 74, 6th ed.

And it is immaterial in such a case that the tenant in tail in remainder transferred his estate (to

which the powers were antecedent) by disentailing deed or recovery. See *Roper v. Halifax*, 8 Taunt. 845, in which case there was a settlement, with a power of sale in the trustees, with the consent of the tenant for life. A recovery was suffered, in which the tenant in tail only was vouched, which was to enure, *to confirm the estates previous to the estate tail and the powers annexed to them*, and subject thereto, to the appointment of the father, tenant for life, and son, tenant in tail, under the settlement. The father and son made a joint appointment (subject to the aforesaid estates and powers) to new uses; and the trustees, and the father and son, conveyed (subject as aforesaid) to new uses, recapitulating the old ones previously to the estate tail, and new powers of sale and exchange were given. It was held by the Court of Common Pleas that the power of sale under the original settlement was not destroyed by the recovery or by the new settlement.

And the result will be the same where, although the original power of sale is not expressly reserved, if it appears clearly to have been the intention of the parties that it should be reserved. *Hill v. Pritchard*, Kay, 394.

If, however, A., tenant in tail in possession under a settlement containing a power of sale to trustees, by executing a disentailing deed acquired the fee, the power would be gone. See *Roper v. Halifax*, Sug. Pow. Append. 563, 6th ed.; *Lantsbery v. Collier*, 2 K. & J. 720, 722; *Cole v. Sewell*, 4 Dr. & War. 1.

2. *As to Powers in Gross.*

Powers in gross are powers given to a person who had an interest in an estate at the execution of the deed creating the power, or to whom an interest is given as well as a power, but he is only thereby authorized to create estates, which will not take effect out of his own interest. To use the words of Hale, C. B., in the principal case, "where the power does not fall within the estate, as where a tenant for life has a power to make an estate which is not to begin till after his own estate determines, such power is not appendant or annexed to the land, but is a power in gross, because the estate for life has no concern in it." Ante, pp. 374, 375.

Amongst powers in gross may be mentioned, a power to a tenant for life to appoint the estate *after his death* amongst his children; a power to jointure his wife *after his death*; a power to raise a term of years to commence *from his death*, for securing younger children's portions. Sugd. Pow. 46, 47, 8th ed.

A reservation also of a power to himself, by a person seised in fee, who settles his estate on others (Ib.), or a power given to a stranger to charge an estate for *his own benefit* (Ib.), will also be powers in gross.

Whether Powers in Gross can be suspended.

It was decided in the principal case of *Edwards v. Slater*, that a power in gross, viz. the power of leasing for thirty-one years *after* the death of the donee, was not suspended by a forfeiture of the life

estate of the donee; "for the donee," observes Hale, C. B., "had a right to make such lease, which was sufficient to support the power." Ante, p. 376.

Whether Powers in Gross can be extinguished by transfer of Donee's Life Interest.

An assignment of *totum statum suum*, or other alteration of an estate for life, will not, as is laid down in the principal case of *Edwards v. Slater*, affect a power in gross. Thus, if a tenant for life, as in the last-mentioned case (and see *Jenkins v. Kemis*, 1 Ch. Ca. 103), or a tenant for years (*Savile v. Blacket*, 1 P. Wms. 777), either assigns such interest, or assumes to pass the fee, in former times, if the conveyance were of that character which would only pass what interest the party conveying actually had, as a covenant to stand seised, a lease or release (*Scrope v. Offley*, 1 Bro. P. C. 267, Toml. Ed.; *Phitton's Case*, cited ante, p. 371), or a bargain and sale (*Jenkins v. Kemis*, 1 Ch. Ca. 103); and at the present time, even if the conveyance were by feoffment, as it has ceased to have a tortious character (8 & 9 Vict. c. 106, s. 4), he will not thereby extinguish any power in gross, such as a power of leasing from the time of his decease, as in the principal case, or of jointuring, or of charging portions (*Savile v. Blacket*, 1 P. Wms. 777; 1 Sugd. Pow. 83); because as the donee has merely conveyed away his own interest, and the appointment is not to take effect until after the termination thereof, he does not by

the execution of the power in any way derogate from his own grant.

And, although a different opinion was formerly entertained (*Snape v. Turton*, 2 Roll. Abr. 263, pl. 2; *Clarke v. Philips*, 1 Vent. 42; *Herring v. Brown*, Carth. 24), it seems now to be clear, as is laid down in the principal case, that a tenant for life, with power to appoint the reversion, or a tenant for life with remainders over, with a power of revocation, can, although he may have aliened his life interest, still exercise his power. See also *Savile v. Blacket*, 1 P. Wms. 777; 1 Sugd. Pow. 86, 87, 88; *Parsons v. Parsons*, 9 Mod. 464.

So, where there was a devise to A. for life, or until insolvency, and, immediately after his death or insolvency, to his children as he should by deed or will appoint, and in default, to the children equally, it was held by Sir W. Page Wood, V. C., that an appointment to a child by A. after his insolvency was valid. *Wickham v. Wing*, 2 Hem. & Mill. 436. See also *In re Stone's Estate*, 3 I. R., Eq. 621; *In re Aylwin's Trusts*, 16 L. R., Eq. 585.

A power in gross cannot, however, be exercised, after the determination of the interest of the donee in the subject matter, if it appears to have been the intention of the settlor that the power should only be exercised during the continuation of the donee's interest. Thus in *Haswell v. Haswell*, 2 De G., F. & J. 456, by a post-nuptial settlement a fund was settled in trust for the husband for life, or until (among other events) he should become an insolvent debtor,

with remainder to the wife for life, remainder to their children or issue, as the survivor should appoint, and, in default of such appointment, from and after the several deceases of the husband and wife, or the sooner determination of the interests thereinbefore limited to them respectively, in trust for the children then living, and the issue of deceased children then living. The husband's interest ceased by his insolvency, and his wife afterwards died. It was held by Lord Campbell, C., affirming the decision of Sir J. Romilly, M. R., (28 Beav. 26), that the interests of the children and their issue in default of appointment thereupon became vested, and could no longer be varied by the execution by the surviving husband of his power of appointment. "I quite agree," said his Lordship, "to the position that the husband's power of appointment was not extinguished on his insolvency. It was a power in gross and might have been exercised at any time, not only while his own interest continued, but while the interest of the wife continued. *Parsons v. Parsons* (9 Mod. 464) has always been held good authority for this doctrine. But in this settlement, although the power of appointment by deed or will is given to the husband and wife, or the survivor of them, I think there is a clear indication that this power was to be exercised while the interest of the husband or of the wife continued. The interest of the children and grandchildren was to vest on the deaths of the husband and wife, 'or the sooner

determination of the interests here-inbefore limited to them respectively.' This was to be in default of appointment, but of appointment before the interests before limited had ceased." See, however, the remarks, Sugd. Pow. 261, 8th ed.; and in *Wickham v. Wing*, 2 Hem. & Mill. 436; *In re Stone*, 3 I. R., Eq. 621; *In re Aylwyn's Trusts*, 16 L. R., Eq. 585.

Effect of Tortious Conveyances on Powers Appendant and in Gross.

Conveyances by a tenant for life, donee of a power which formerly had a tortious operation, such as a fine, recovery and feoffment, would in general extinguish powers both appendant and in gross (*Albany's Case*, 1 Co. 111; 4 Leon. 133, 219; *Bickley v. Guest*, 1 Russ. & My. 440; *King v. Melling*, 1 Vent. 225; *Savile v. Blacket*, 1 P. Wms. 777; *Bird v. Christopher*, Sty. 389; and see *Stewart v. Marquis of Donegal*, 2 J. & L. 636); but if part of the land only were comprised in the conveyance, the power would remain as to the rest. *Digges's Case*, 1 Co. 157 a; and see Mo. 618.

The acceptance, however, of a feoffment by the tenant for life would not, as is laid down in the principal case, destroy a power in gross. Ante, p. 313.

In some cases a feoffment or fine would not extinguish a power, as where a fine was levied after the execution of the power (*Thomlinson v. Dighton*, 10 Mod. 71; *Bullock v. Thorne*, Mo. 615; *Ingram v. Parker*, T. Raym. 230, cited; 1 Vent.

280, 291; and see *The Earl and Countess of Jersey v. Deane*, 5 B. & Ald. 569; and *Cooke v. Cunliffe*, 17 Q. B. 245); and where a tenant for life having power to lease for life, made a lease by feoffment, it was good, because by the deed the lease took effect, and so the livery came too late (1 Vent. 291). And a deed and a fine have together been held a valid execution of a power. *Earl of Leicester's Case*, 1 Vent. 278; *S. C. nom. Wigson v. Garret*, 2 Lev. 149; T. Raym. 239.

These questions will seldom now arise, as fines and recoveries have been some time since abolished (3 & 4 Will. 4, c. 74); and feoffments no longer have a tortious operation (8 & 9 Vict. c. 106, s. 4), so that they only now operate in the same way as a release or a bargain and sale.

A disentailing deed executed and enrolled only for the purpose of barring an estate tail, and declaring the uses to the tenant for life for his life, and to the tenant in tail in fee, will not per se destroy or extinguish a leasing power which the tenant for life had under the instrument creating the estate for life and the estate tail. *O'Fay v. Burke*, 8 Ir. Ch. Rep. 225, 245; *Barrow v. Barrow*, 4 K. & J. 409; 4 Jur., N. S. 1049.

Extinguishment of Powers Appendant and Powers in Gross, by Release.

Having considered how far powers of various kinds may be either suspended or extinguished, by any act of the donee or others with respect to the property, we

may now consider how far they are capable of being suspended or extinguished by a *release*.

It has long since been decided, that powers *simply collateral*, that is to say, powers given to a stranger, who has no interest in the land, cannot be released, where they are to be exercised for the benefit of another. *West v. Berney*, 1 Russ. & My. 434, ante, p. 377.

With regard to powers *not simply collateral*, viz. powers appendant and in gross, it is clear upon principle they may be either defeasanced or released; for a power of this kind not being a trust, it is optional with the donee, whether he execute it or not, and if he were to be allowed to exercise it, after a release to the person taking the estate subject thereto, he would be derogating from his own grant. And this is fully borne out by the authorities; for it is laid down in a well-known case, that a present power not simply collateral may be extinguished by release, to any one who has an estate of freehold in the land, in possession, reversion or remainder, and the estate defeasible or chargeable by the power is thereby made absolute. See *Albany's Case*, 1 Co. 113 a.

A full execution of a power will amount to a release (1 Atk. 567), but the intention to execute fully must be clear. *Zouch v. Woolston*, 2 Burr. 1136; *Earl of Urbridge v. Bayley*, 1 Ves. jun. 499; *Hervey v. Hervey*, 1 Atk. 561.

So a future or executory power may be released. Thus where a man entitled to a life interest in an estate, with remainder to another in

tail, with remainders over, had a power of revocation and new appointment, and he afterwards released his power to a feoffee and the remainderman; it was held by the Court of King's Bench, that the future power was thereby extinguished. *Albany's Case*, 1 Co. 110 b.

Although there appears to have been some doubt upon the subject (*Digges's Case*, Mo. 605), it seems to be settled at the present day, that a power may be *partially* released; as, for instance, a person having a power of revocation may release it so far, as not to be able to exercise it, without the consent of a particular person. *Leigh v. Winter*, 1 Sir W. Jones, 411; *Earl of Tankerville v. Coke*, Mose. 146; *Green v. Green*, 2 Jo. & Lat. 529; *Barron v. Constable*, 7 Ir. Ch. Rep. 467.

And the donee of a power, though it is to be executed only by will, may bind himself not to execute it, or not to do so, except under certain restrictions. *In re Chambers*, 11 Ir. Eq. Rep. 518.

It is clear that a power may be released, where it is for the donee's benefit, as a power to charge a sum of money for himself. In such case, his joining in a conveyance of the land, clear of the charge, would be a release. *West v. Berney*, 1 Russ. & My. 434.

Every power, moreover, reserved by the grantor, whether he has retained an interest in the estate as tenant for life or otherwise, is an interest in him, which may be released or extinguished. Per Sir J. Leach, V. C., in *West v. Berney*, 1 Russ. & My. 435; *Bird v. Christopher*, Sty. 389.

And not only may general powers, or powers under which the appointor takes an interest, be released, but also powers pointing to particular objects, as children, may be released. Thus in *Horner v. Swann*, T. & R. 430, a testator gave real property to trustees, upon trust for his wife for life, with a power of appointment among their children. It was held by Sir J. Plumer, M. R., that the widow could release or extinguish her power. See also *Smith v. Death*, 2 Madd. 371; *Bickley v. Guest*, 1 Russ. & My. 440; 1 Bligh, 15.

So where a sum of stock was held in trust for a lady for life, "then for any husband," in case she should appoint to him, and subject thereto in trust for her children, and in default of children to such uses as she should appoint. The lady, at the age of sixty-eight, having never married, appointed the fund to herself, and released the power of appointing to any husband and children. It was held by Sir L. Shadwell, V. C., that she was entitled to a transfer of the capital. *Miles v. Knight*, 17 L. J., N. S., Ch. 458; 12 Jur. 666.

And an agreement or covenant not to execute a power will operate either wholly or pro tanto as a release thereof. Thus where a tenant for life, having a power to charge the estate with portions for younger children, mortgaged his life estate, and covenanted not to exercise the power, it was held by Sir J. Romilly, M. R., that he could not afterwards charge the estate with portions to the prejudice of his mortgagees (*Hurst v. Hurst*, 16

Beav. 372). And a tenant for life may covenant with creditors to make a certain appointment by will in favour of a child an object of the power (*Coffin v. Cooper*, 13 W. R. (V. C. K.) 571). And where a father covenanted, in his daughter's marriage settlement, not to exercise a power so as to diminish her portion under his own settlement, it was held by Sir W. Page Wood, V.-C., to be a release pro tanto of the power. *Davies v. Huqenin*, 1 Hem. & M. 730. See also *Isaac v. Hughes*, 9 L. R., Eq. 191.

If the intention be clear, a power may be released, extinguished or suspended by implication without express words.

But a recital which might otherwise operate as an agreement to release may be controlled by the whole scope and context of the deed, which shows that such was not the intention of the parties. *Boyd v. Petrie*, 7 L. R., Ch. App. 385, 394.

And a tenant for life entitled to appoint a sum of money charged on an estate, by joining with the owner of the reversion (being also a person to whom the sum might be appointed under the power) in a resettlement of the estate, might thereby do what is equivalent to a release of the power. See *In re Norcott's Estate*, 14 Ir. Ch. Rep. 315; *Isaac v. Hughes*, 9 L. R., Eq. 191.

But no effect will be given to a release of a power by a father, so as to vest in himself property which was intended for his children; or, in other words, a power given for a particular purpose, will not be allowed

by a fraudulent circuitry to be exercised for a different purpose. Thus in *Cunninghame v. Thurlow*, 1 Russ. & My. 436, where a fund was limited to a father for life, with remainder to his children in such shares as he should appoint, and in default of appointment to the children equally, the father released the power as to a portion of the fund, so as to vest a share of it in himself as executor of a deceased son, who, in default of appointment, took a vested interest. Sir L. Shadwell, V. C., although he was of opinion that the power was extinguished by the release, nevertheless decided, that the Court ought not to give present effect to the release, so far as it operated to vest a share of the fund in the father, who was the donee of the power.

In the case, however, of *Smith v. Houblon*, 26 Beav. 482, a father had an exclusive power of appointment in favour of his children over a fund, which in default of appointment was limited to them equally, and as representative of a deceased son he was, in default of appointment, beneficially entitled to one-third of the fund. The father released the power to his mortgagees. A bill was filed by the mortgagees praying, amongst other things, for a declaration that the deceased son's share, on the release of the power, became vested in the mortgagees. Counsel for the mortgagees distinguished the case from *Cunninghame v. Thurlow*, inasmuch as there the donee of the power, by the deed releasing it, obtained for himself a personal benefit, to which he would not otherwise have been entitled;

whereas, in the case under consideration, the release was to the mortgagees, as against whom the mortgagor could not execute the power, in derogation of his own grant. It was held by Sir John Romilly, M. R., that the power had been effectually released. And he declared the rights of the parties consequent thereon.

The marriage of a woman donee of a power will not extinguish or suspend the power. *Whitmarsh v. Robertson*, 1 Coll. 570.

Formerly, a married woman could only release or extinguish a power by fine or recovery, but now she may do so under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), by deed acknowledged, in which her husband concurs (s. 77); and by the 78th section it is enacted, "that the powers of disposition given to a married woman by the act shall not interfere with any power which, independently of the act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under the act she may be prevented from doing so, in consequence of such power having been suspended or extinguished by such disposition."

A married woman may now, by 20 & 21 Vict. c. 57 (Malins' Act) dispose of reversionary interests in personal estate to which she may be entitled under any instrument made after the 31st December, 1857 (except such settlement as after mentioned), and also release or extinguish any power in regard to any such personal estate as if she were

a feme sole; the husband, however, must concur in the deed, and it must be acknowledged according to the requirements of 3 & 4 Will. 4, c. 74. The act is not to extend to any reversionary interest where the married woman is by the instrument under which she becomes entitled, restrained from alienating or affecting the same (sects. 1, 2). The powers of disposition given to a married woman by the act are not to interfere with any power which, independently of the act, might be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act, she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition (sect. 3). And there is a proviso that the powers of disposition thereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement made on the occasion of her marriage (sect. 5).

It may be here mentioned that by 20 & 21 Vict. c. 85, s. 26, in case of a judicial separation between husband and wife, nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband.

Distinction between Co-existence of a Power and the Fee, and extinguishment of Power on accession of Fee.

Although a power, whether over

freeholds (*Maundrell v. Maundrell*, 10 Ves. 246) or copyholds (*Glass v. Richardson*, 9 Hare, 698; 2 De G. Mac. & G. 658), may co-exist with the fee, the latter being subject to be divested by an exercise of the power of appointment (see Co. Litt. 216 a; *Maundrell v. Maundrell*, 10 Ves. 246); it seems, nevertheless, that a power given to the owner of a particular estate, whether appendant or in gross, will be extinguished by his acquisition of the fee simple. *Cross v. Hudson*, 3 Bro. C. C. 30.

Where, however, a power is merged or extinguished by the accession of the fee, and the person seised in fee attempts to exercise the power, the Court of Chancery has held that the disposition so made must take effect out of his interest. See *Cross v. Hudson*, 3 Bro. C. C. 30. There an estate was conveyed to John Hay for life, with remainders over, and with the ultimate remainder to the survivor of him and his wife in fee. And a power was given to him by will to appoint 100*l.* a year, to take effect after his decease. By his will, made in exercise of his power, he appointed 100*l.* chargeable on the premises. Afterwards his wife died in his lifetime, and all the intermediate remainders became incapable of taking effect, so that he was seised in fee. Lord Thurlow held that the power was merged by the accession of the fee, and that the disposition made by the testator must take effect out of his interest, though the power was gone.

So in *Mortlock v. Buller*, 10 Ves. 292, 315, where the power to trustees

of a deed of settlement to sell was extinguished at law by the tenant for life's acquisition of the fee, Lord Eldon said that, though the power was gone at law, yet if the purchaser entered into a contract with the trustees, with the approbation of the tenant for life and his wife, according to the deed, that contract, once entered into, and having bound the estate, though it could not be executed by the power of sale, should be made good by those who had got an interest—by the effect of their interest, if not by the authority of the trustees. See also *Sing v. Leslie*, 2 H. & M. 68.

How long a Power lasts; when it ceases to exist.

Ordinarily a power will continue as long as there are objects in existence for whose benefit or on whose account it was intended by the donors of the power that it should be exercised.

A power, moreover, will not necessarily be extinguished by having been once exercised. Of this the power of leasing is an obvious example. So in *Versturne v. Gardiner*, 17 Beav. 338, under a power to lend 2,500*l.* of the trust funds to the tenant for life, it was held that it was not exhausted by one loan, but, after repayment, the power might be exercised a second time.

So, a power of jointuring may be executed in favour of the same wife at different times, provided that the donee of the power do not in all the executions exceed the limit thereof. 2 Sug. Pow. 310, 6th ed.; *Hervey v. Hervey*, 1 Atk. 561; *Zouch v. Woodston*, 2 Burr.

1136; 1 Black. 281; *Doe v. Milborne*, 2 T. R. 721.

Where a power is given to raise money by sale or mortgage, the question may arise whether if a mortgage be made first the power is not wholly exhausted, so that a sale cannot be afterwards made so as to exonerate the estate. The solution of this question depends upon the intention of the parties, and if they desire that a sale should be made after a mortgage in order to pay it off, their intention should be clearly expressed. 1 Sug. Pow. 539, 6th ed.; *Omerod v. Hardman*, 5 Ves. 722, 732.

A power, however, whether pendant or in gross, cannot be exercised where all the purposes for which it was created have ceased to exist; as, for instance, where all the limitations in a settlement have failed, and the life estate of the settlor becomes united with the reversion in fee, so that the power is no longer necessary to enable him to dispose of his interest, for it could not be intended that any disposition that he might make should be superseded by the exercise of the power. *Wheate v. Hall*, 17 Ves. 80, 86. See also *Mortlock v. Buller*, 10 Ves. 292, 315, ante, 392; *Wolley v. Jenkins*, 23 Beav. 53.

So likewise a power is destructible directly the property vests in a tenant in tail in possession, who can, if he pleases, dispose of the whole estate. Per James, V. C., in *In re Brown's Settlement*, 10 L. R., Eq. 353.

A power of sale may however continue over the whole as long as there is a settled estate in any part of the property subsisting. See

Trower v. Knightley, 6 Madd. 134. There an estate was devised to trustees in fee, in trust as to one moiety for the devisor's daughter A. for life, with remainder for her children at twenty-one; and in trust as to the other moiety for his daughter B. for life, with remainder for her children at twenty-one, with power to the trustees for the time being to sell *during the continuance of the trust*. A power of leasing was also given to the trustees. A. died, and her children had attained twenty-one. The children of B. were infants. It was held by Sir John Leach, V. C., that the trustees had

power to sell the entirety, as the testator must have meant these powers of ownership (one of which was that of leasing) to the trustees to continue until there were owners competent to deal with the whole estate. See also *Taite v. Swinstead*, 26 Beav. 525; *In re Brown's Settlement*, 10 L. R., Eq. 349.

But, although the power of sale may be determined as to one part, the trusts whereof are exhausted, it may continue as to the remaining parts subject to continuing trusts, if such appears to have been the intention of the donor of the power. *Wood v. White*, 4 My. & C. 460, 475, 476.

ALEXANDER v. ALEXANDER.

July 17, 1755.

[REPORTED 2 VES. 640.]

EXCESSIVE EXECUTION OF POWERS.]—*A widow, having power to appoint 6,000*l.* among her children, by will appoints 100*l.* to her daughter A., one-fourth of the residue to her daughter M., one-fourth to her son J., for their own respective use, and she gave the remaining two-fourths to M. and J., upon trust, as to one-fourth part to place it on securities during the life of another daughter, C. (a married woman), and pay the interest to her for her separate use, and at her decease upon trust for her children, as she should by writing in the nature of a will or otherwise appoint, and in default of appointment, to her children equally; if there were no children, such one-fourth, if C. survived her husband, to be paid to her for her only use; but if C. died in the life of her husband, at her decease one-third of the one-fourth to go to J., and another one-third to M., and the remaining one-third, together with the remaining one-fourth part, was to be in trust to be applied as M. and J. should think most beneficial for the personal support and maintenance of the testatrix's son F. his wife and children, but not for payment of his debts.*

*Held, that the appointment of 100*l.* to A., of the two-fourths to J. and M. absolutely, and of a life interest to C. for her separate use was good, but that the provision for her children was bad, the power not warranting an appointment to grandchildren, though a settlement might have been made on the marriage of C., by which such provision might have been made.*

Held, also, that if C. left children at her death, the limitations over of her fourth would be void, and it would fall into the residue.

Held, also, that the limitation of the one-fourth in trust for F. his wife and children was a valid appointment to A. absolutely (sed quære),

and that the proviso, by which what F. took was not to be liable to his debts, was void.

A power may be good and bad in part, and the excess only void, where the execution is complete, and the bounds between it and the excess clear.

JAMES ALEXANDER by will bequeaths to two trustees 6,000*l.*, describing particularly the funds of which it consisted, upon trust to pay the interest and produce to his wife for life, and directs them to place the same out at interest with her consent; "and I give unto my said wife the absolute disposal of the said sum of 6,000*l.* unto and among *such children* begotten between us, and in such proportion as she shall by last will and testament, or by any other deed or deeds, writing or writings, to be executed by her in her lifetime, attested by two or more credible witnesses, direct, limit and appoint;" he then directs the trustees to pay the same according to such will or appointment; and for want of such a will or appointment that the said 6,000*l.* should fall into and go in the same manner as the residue of his personal estate; but if his wife should think fit to apply in her lifetime any part of the said 6,000*l.* as an increase of another of the portions given by the will to his said children, or any of them, for their better advancement in marriage or otherwise in the world, then the trustees should, out of the said 6,000*l.*, issue and pay such part thereof for the benefit of such children as his wife should by any writing as aforesaid direct and appoint.

The mother makes her will, there being then five of the children living, she thereby recites her power, and in pursuance thereof gives to her daughter *Anne* 100*l.*, to be paid out of the sum of 5,390*l.*, which she computed to be the only remaining sum of 6,000*l.*, after deducting what she had before paid to some of her children; and as to the remaining produce, after payment of the said 100*l.*, she disposes to her daughter *Mary* and son *James*, for their own respective use, each one full fourth part thereof, (the whole into four parts equally to be divided,) and to the said *Mary* and *James* also the other remaining two fourth parts; but as to those two fourth parts upon the trusts following, viz. as to one of the same to place out or continue on securities during the life of their sister, her daughter *Catherine*, wife of *Thomas Clipperton*, and to pay the interest thereof to such person or persons and for such

purposes as she shall from time to time direct, and in default of such direction into her own proper hands, my will being that such interest shall be for her separate use and disposal, and not subject to the debts, control or engagements of her present or any future husband; and upon trust at her decease to pay and apply the principal of such fourth part to *such child or children*, if any, as she shall happen to have living at her decease, in such manner as she shall by writing under her hand in nature of a will or otherwise appoint; and, for want of such appointment, to such child, if but one, if more, to them equally; in default of such child or children the principal of such fourth part, if she survives her husband, to be wholly paid to her for her only use and benefit; but if she dies in his life the said principal at her decease to go to the said *James* and *Mary*, yet for their own respective benefit only as for one third part thereof to each of them; and as to the other third part thereof, and also as to the other of such remaining two fourth parts, whereof no disposition is herein yet made, upon trust to pay and apply the principal and interest thereof, or any part of either, from time to time, weekly or otherwise, in such manner as the said *Mary* and *James*, their executors, administrators or assigns shall in their discretion think most beneficial for the personal support and maintenance of their brother, my son Francis, and his wife and children, but not for the payment of his debts.

Sir *Thomas Clarke*, M. R., said, there were some particularities in the case, and he would consider it, and the next day delivered his opinion.

Considering the nature of the power, the wife was confined as to the *objects* to give it to, but left to her discretion as to apportioning it among them. In consequence of this she was obliged to give the whole among the children,—every child must have some,—such share as she pleased, provided it were not illusory (*a*); which has been the language of the Court as to such appointments. If then she might apportion as she pleased, it is necessarily implied in that, that she might apportion it out in such manner as she pleased; for it is such kind of proportions, as she should think fit; and therefore the power in the first part of the will does not differ from the latter part, where the word *manner* is added; for the first word means kind of propor-

(*a*) See now 1 Will. 4, c. 46; 37 & 38 Vict. c. 37; and 1 L. Cas. Eq. 438, 445, 5th ed.

tions. This is the nature of the power (b) ; consequently, she might give an interest for life in a particular share to one child, or limit the capital of the same share to another, or even go so far as to limit it to a third child upon a contingency ; provided she doled out the whole in these various ways among all the children only. One restriction she was under, that she could not have given any one child merely a reversionary interest (c) ; for it was intended as a provision, and therefore it would be deemed illusory. The power did not require that she should dole it out in gross sums, and give each child an absolute interest in that gross sum ; for which, among several other cases, *Thwaytes v. Dye*, 2 Vern. 80, is a strong authority that such a power will enable the giving particular interests, and to apportion such interest as a general power of apportioning land itself would. As this is necessarily implied, there is nothing in the objection, that where this is designed the power is more extensive, and words added.

As this is the nature of the power, consider what is done under it. It is observable, that in consequence of the nature of the power, the mother has given to each of the five children then alive a share in possession, not merely a reversionary interest, which I should have doubted whether it would be good. The 100*l.* to *Anne*, and the one-fourth of the residue to *James*, and the other fourth to *Mary* absolutely, are undoubtedly good ; so is the interest to *Catherine* for life in the other fourth part ; and the giving it to her separate use is so far from being an objection, that it is more strictly carrying into execution the will of the father, a stronger execution of the power agreeably to his intent.

But next the provision for the children of *Catherine* is not a good appointment. The mother had a power to do something similar to this, but in another way ; for though that power would have enabled her, for better advancement in marriage, to make a strict settlement, that is implicitly contained in that power to limit any share she thought fit to give for advancement of marriage, in that way ; but she has not taken that method, for she has made a disposition of it by her will, and therefore it must correspond with every circumstance in that will. No case will, under a power (d) to appoint to children,

(b) 2 Brown, 22.

(c) 1 Brown, 450.

(d) Though an appointment to grand-children under such a power is void, yet it

ought to prevail so far as the power extends. Cowper, 637 ; 2 Brown, 30, 54, where Sir Lloyd Kenyon, M. R., held, that the excess only was void. 3 Burr. 1626.

warrant a gift to grandchildren : there is a case in point to that, if it needed it, in *Vernon* ; but it clearly cannot. *Thwaytes v. Dye* (2 Vern. 80) is more like an authority on that side of the question ; but that is no authority to contradict the reason of the thing, that the appointment to the children is bad.

Next, as to the contingent interest to *Catherine* if she had no children and she survived her husband ; but, in default thereof, two-thirds to *James* and *Mary* ; the other third to go over with the other fourth to *Francis* : suppose *Catherine* leaves children at the time of her death, it is impossible any of these limitations over should take effect ; it will fall into the residue, because it was no appointment, being only a partial appointment of that fourth, given only to *Catherine* for life ; and the children, though they could not take themselves, would yet prevent the limitation over.

But the most material limitation is that given last to *Francis*, his wife and children. Consider the effect of this appointment ;—first on a supposition that this discretionary power was good, and had been exercised by *James* and *Mary*. It is clear they could not have duly exercised that power without giving a share to the wife and children of *Francis* ; otherwise it is not consistent with the mother's intent ; nor can I say they could discreetly have given the whole to *Francis* ; and it is clear, that if they had exercised this power to the wife and children, it would have been bad. If they had given anything (as they must something in consequence of their power), it would have been giving so much contrary to the intent and effect of the power ; but I am clearly of opinion this discretionary power was not good ; because, if there is a power to A. of personal trust or confidence, to exercise his judgment and discretion, A. cannot say this money shall be appointed by the discretion of B., for *delegatus non potest delegare*. It was determined by the Lord Chancellor (Lord Hardwicke) in *Attorney v. Berryman*, Feb. 11, 1752, where a personal estate was given to such charitable use as one Dr. *Berryman* should appoint ; he directed the money to be applied as another Dr. *Berryman*, his brother, should appoint, which the Court would not allow.

Next consider the consequence of this ; if the power could not be exercised, will it devolve on the Court ? It clearly cannot (e) ;

(e) 1 Ves. 60.

for powers devolving on the Court are powers well created in the original ; but such as by accident (*f*), as the death of persons, cannot be executed by those persons ; there is a natural substitution of the Court in the room of those persons. But if a power is void in the original, there is nothing to devolve on the Court.

It is the same as if the mother had given it herself indefinitely for the benefit of *Francis*, his wife and children, laying the discretionary power out of the ease, as if never inserted in the will ; and certainly, so far as the wife and children were to have the benefit of it, that would not be good. Nobody could say how much the wife and children were entitled to, because it is given indefinitely. Had it been free from that circumstance of uncertainty, how much each was to take, it would be void as to the wife and children just as that given to *Catherine*. Suppose she had given it to the husband, his wife and children, in gross sums absolutely, equally to be divided, that would have been bad and an excess of her power ; and if it had been such a partial appointment, so far as void, it would have fallen into the residue.

The material question then is as to the consequence of this, whether the wife and children being incapable of taking, will carry the whole to *Francis*, or whether any *medium* can be found out, it is said, to carry the whole to *Francis* ; because the execution of a power may be good in part and bad in part ; and that even at law an irregular execution of a power will be supported, and not amount to no execution at all (*g*) ; and that in many cases only the excess of a power will be void, the residue good. All that I admit ; first, that the execution of a power may be good and bad in part ; but the consequences of this will be various, as the circumstances of the cases are ; as suppose a power to a man to appoint 1,000*l.* among his children ; he appoints 100*l.* among the children, and 900*l.* among others who are strangers, the appointment of the 900*l.* will be so absolutely void, as that it will not be prevented from going over, if limited over for want of appointment, as if he had made none ; and something of this has happened in this case, or may happen, as to *Catherine*. On the other hand, if the father gives the whole 1,000*l.* to his children, and annexes a condition that they shall release a debt

(*f*) In such case the Court must be governed by the Statute of Distributions. Per Lord Mansfield, Durnf. & East, 438, *ii.* ; 1 Brown, 451.
(*g*) 2 Ves. 642.

owing to them, or pay money over, the appointment of 1,000*l.* would be absolute, and the condition would be only void; and the boundaries between the excess and proper execution are precise and apparent. The ground and principle of all this is, that where there is a complete execution of a power, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void; but where there is not a complete execution of a power, where the boundaries between the excess and execution are not distinguishable, it will be bad. Suppose one has power to jointure a wife for life, and appoints to her for ninety-nine years, if she so long live, as in the case of Mr. *Newport*, at law it was held in B. R. to be void, but in equity good *pro tanto*; because he has done less than his power, and it clearly appears how much less the boundaries are clear and distinguishable. If the wife should outlive the ninety-nine years, the estate, as to the residue of her life, will be undisposed of, and will go over to the remainderman or other person entitled. Now to put a case *vice versâ*, suppose a person has power to lease for twenty-one years, and he leases for forty, that shall be good for the twenty-one, because it is a complete execution of the power, and it appears how much he has exceeded it. If the Court can see the boundaries, it will be good for the execution of the power, and void as to the excess. Now, is this appointment for the benefit of *Francis*, his wife and children, a complete execution as to *Francis*? (for that is contended for). I think certainly not; for the wife and children were to have something, and so far as something is designed for them it is bad, and there is no possibility of distinguishing how much she has exceeded the power; it falls, therefore, within neither of those circumstances, which are essentially necessary.

But it is proper to consider if there is no other way to make this good; because the Court will strongly lean in favour of that side if it can. I own I incline to think there is a method. Suppose the mother, instead of using the words she has, had given this one-fourth to be applied in such way as was *most beneficial* for (*h*) her son and his wife and children, if they shall by law be capable, I should not have doubted, but that as the wife and children

(*h*) Lord St. Leonards has observed that the reasoning of Sir T. Clarke, M. R., on this point is artificial and not satisfactory. Sng. V. & P. 504, 505, 8th ed. See also *In re Kerr's Trusts*, 4 Ch. D. 602, where

Jessel, M. R., agrees with Lord St. Leonards, and observes that the decision on this point "has been overruled by the authorities."

are not by law capable, it would be absolute to *Francis*; and the question is, whether there is any difference. This bears an analogy to what the dispositions by the mother would be if she had given it to a son by name who never appeared to have existence, or was never capable of taking; if given to these four indefinitely, and three were incapable of taking, the fourth would have the whole, must take such, as the others were incapable of taking. It falls within the reason of the late case of *Humphrey v. Tayleur* (1 Amb. 136) (i), where a personal estate was given to two in joint tenancy, one was outlawed, and, therefore, the testatrix made a codicil, whereby she adeemed what was given to one of the two; the question was, whether the other joint-tenant should take only a moiety, but the Court held, he was to take what the other did not. They were to take the whole between them, the mother never designed this fourth part should fall into the residue, and it would be extremely hard that it should. Then he [*Francis*] will be entitled to the whole of that.

As to the subsequent restraint, that it should be exempt from debts, she has there exceeded the power given by the law, as in the other case she exceeded the power given by her husband; for it will be left to take the fate of being his property, and subject to be come at as his creditors shall think fit.

I declare, therefore, that the execution of the power, so far as it concerns other persons than the children of the testator, is void and of no effect.

Note.—At the bar was cited the case of *Lord Comray*, who, having power to grant leases of his estate by one instrument, granted several, some of which were not within the power; and, though all were within the same instrument, they were considered as several leases, and it was sent to the Master to separate them.

Also *The Dean and Chapter of St. Paul's Case*, to show that where a power exceeded is void at law in the whole, this Court will hold it good as an agreement, and direct a specific performance, restraining the contract according to the power, as was done there.

(i) Sed vide *In re Kerr's Trusts*, 4 Ch. D. 600.

Alexander v. Alexander is usually cited as a leading authority, when the question is discussed, whether there has been an excessive execution of a power and what are the effects thereof. The principle upon which Courts deal with excessive executions of powers is well laid down there by Sir Thomas Clarke, M. R., viz.—that “where there is complete execution of a power, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void; but where there is not a complete execution of a power, and the boundaries between the excess and execution are not distinguishable, it will be bad.” Ante, p. 401.

It is proposed here to consider when the execution of a power may be excessive; first, where objects are included not intended by the power; secondly, in the amount or quantity of the subject-matter of the appointment; thirdly, by the imposition of conditions not authorized by the power; fourthly, where a power, executed substantially, though not strictly modo et formâ, is valid in equity.

Excess in the execution of powers by transgressing the rule against perpetuities will be considered in the note to *Cadell v. Palmer*, post.

I. *As to an Excessive Execution of a Power with regard to its Objects.*

Where a person has power to appoint to certain objects, it is clear that he will not be able to appoint to others. Thus, for instance, as was decided in the principal case, a

power to appoint to children will not authorize a gift to grandchildren. *Bristow v. Warde*, 2 Ves. jun. 336; *Butcher v. Butcher*, 1 V. & B. 79; *Palmer v. Wheeler*, 2 Ball. & B. 27; *Ex parte Bernard*, 6 Ir. Ch. Rep. 133; *Kennerley v. Kennerley*, 10 Hare, 160.

So a power to appoint to children born before the appointment will not extend to those born afterwards. *In re Farncombe's Trusts*, 9 Ch. D. 652.

So, likewise, a power to appoint to children living at the time of the decease of one of their parents will not authorize an appointment to a child who has died before such parent, though he may have survived the appointor. *Denning v. Ellerton*, 26 Beav. 231. See also *Mapleton v. Mapleton*, 4 Drew. 515; *Hanbury v. Tyrell*, 21 Beav. 322; *Neatherway v. Fry*, Kay, 172. So likewise, in *Waring v. Lee*, 8 Beav. 247, where a testator gave his widow power by deed or will to appoint “to nephews and nieces, grand-nephews and nieces,” it was held by Lord Langdale, M. R., that she was not authorized to make an appointment to a grandniece for life, with remainder to her children. “Is there,” said his Lordship, “any indication in the present case of including the children of grand-nephews and nieces in the expressions ‘grandnephews and nieces?’ I think there is none. In the absence of such indication, and the power not literally extending to make the grandchildren objects of the power, I must hold that the appointment in favour of the children of the grandnieces is invalid.”

D D 2

See *Hewitt v. Lord Dacre*, 2 Keen, 622.

Where, however, the donor of the power uses the words children and grandchildren indiscriminately, the Court, upon a slight indication of intention, extends the word beyond its strict limits. Such was the case of *Hussey v. Dillon* (Amb. 603; *S. C. nom. Hussey v. Berkeley* 2 Eden, 196), in which a *great-grandchild* had been described as a grandchild, and the case of *James v. Smith* (14 Sim. 216), in which the expressions "nephew" and "children of nephews" had been used convertibly. Per Lord Langdale, M. R., in *Waring v. Lee*, 8 Beav. 249.

In *Thomas v. Lloyd*, 25 Beav. 620, a testator gave his wife a power of appointment in favour of "his children, including grandchildren and more remote issue, such issue coming into being in the lifetime of his wife." It was held by Sir J. Romilly, M. R., that under an appointment to grandchildren, a grandchild born after the decease of the testator's widow might take. Since his Honor considered that the words "such issue coming into being in the lifetime of my wife" related only to the more remote issue mentioned immediately preceding them, and not to the grandchildren.

A power to appoint a fund to a daughter will not authorize an appointment to her husband, even although if the appointment had been made to his wife, he would have been entitled to the fund in his marital right. *Hanbury v. Tyrell*, 21 Beav. 322.

Where there has been an excess in the execution of a power, by giving a share or partial interest to a stranger, if the excess in the execution of the power for the benefit of the stranger is clearly distinguishable from the benefits provided for the objects of the power, the latter will be valid. Thus if a man have power to appoint 1,000*l.* among his children, and he appoints 100*l.* among his children, and 900*l.* among others who are strangers; the appointment of the 100*l.* will be valid, but that of the 900*l.* will be absolutely void, so that it will not be prevented from going over, if limited over for want of appointment, as if he had made none. See ante, p. 400.

So likewise in *Crozier v. Crozier*, 2 C. & L. 294; *S. C. 3 D. & War.* 373, where upon the marriage of A. certain lands were by settlement conveyed to A. for life, and after his decease to such of his children as he should by deed or will appoint, and to their heirs and assigns, and for default of appointment to such children equally. A. having several children devised these lands to his wife for her life, upon condition that she should support, maintain and educate the children, and after her decease to A.'s son John. It was held by Lord Chancellor Sngden, that the gift to the wife was void, but that the trusts in favour of the children were valid, and that the gift to the son was good, the execution of the power being void only for the excess and not in toto. See also *Harvey v. Stracey*, 1 Drew. 73.

Again, if an appointment be made

to persons who are and persons who are not objects of the power, as tenants in common, the appointment to the persons not being objects of the power will be void, and their shares will go as in default of appointment. Thus in *Sadler v. Pratt*, 5 Sim. 682, where E. having four children by her first husband, and three by her second, and having a power to appoint a fund amongst the former only, appointed it amongst *all* her children equally, and declared that if her children by her first husband should refuse to share the fund with her other children the whole fund should go to her youngest child by her first husband. It was held by Sir L. Shadwell, V. C., that the first class of children took each one-seventh of the fund under the appointment, and that the appointment to the children of the second marriage being void the shares given to them went as in default of appointment. *In re Farncombe's Trusts*, 9 Ch. D. 652.

In one of the points determined in *Alexander v. Alexander*, the donee, who had power to appoint a sum of money among her *children*, gave one part thereof "upon trust to pay and apply the principal and interest thereof, or any part of either, from time to time, weekly or otherwise, in such manner as the trustees, their executors, administrators or assigns, should in their discretion think most beneficial for the personal support and maintenance of her son Francis, and *his wife and children*, but not for payment of his debts." It was held by Sir Thomas Clarke, M. R., as the

wife and children were not by law capable of taking, Francis was entitled to the whole absolutely. It is, however, doubtful whether the decision upon this part of the case is right, as it seems scarcely possible to separate the gift to the husband from that to his wife and children (ante, 401). See Sugd. Pow. 505, 8th ed.; *Martin v. Scan- nell*, 2 Beav. 249; *Crozier v. Crozier*, 3 Dru. & War. 353. See also *In re Kerr's Trusts*, 4 Ch. D. 602; where Sir G. Jessel, M. R., observes that the decision on this point in *Alexander v. Alexander* "in effect was, that although there was no possibility of ascertaining what shares the appointees were intended to take, yet the one object took the whole, and that it has been overruled by later authorities."

In the case of *Lloyd v. Lloyd*, 26 Beav. 96, there was a power to appoint to children, "with such directions or regulations for maintenance, education and advancement as their mother should appoint." The mother appointed the income to the children's father, until the youngest attained twenty-one, in or towards the maintenance and education of all her children. It was held by Sir J. Romilly, M. R., that the appointment was invalid. See also *In re Brown's Trust*, 1 L. R., Eq. 74.

It seems that where an appointment of personalty is made to objects of the power and strangers as joint-tenants, if it appear to have been the intention of the appointor that they should take equal shares, the objects will not be entitled to the whole fund, but only to the shares

intended for them, and that the shares intended for the strangers will go as in default of appointment. See *In re Kerr's Trusts*, 4 Ch. D. 600; *Bruce v. Bruce*, 11 L.R., Eq. 371.

But it seems that in the case of a similar appointment of realty, the object of the power would take the whole. *Humphrey v. Tayleur*, Amb. 138.

If partial interests are given to persons who are objects of the power, with remainders over to persons who are not, the remainders over only will be void, and the objects of the power will take the partial interests conferred upon them (*Brudenell v. Elwes*, 1 East, 442; 7 Ves. 382; 2 T. R. 254; *Routledge v. Dorril*, 2 Ves. jun. 357; *Smith v. Lord Camelford*, Ib. 698; *Crompe v. Barrow*, 4 Ves. 681; *Adams v. Adams*, Cowp. 651; *Hanbury v. Tyrell*, 21 Beav. 322); nor is it any reason for setting aside the whole appointment that the donee of the power would not have made such an appointment could he have foreseen that any inequality would have arisen from a failure of a part of the appointment. *Bristow v. Warde*, 2 Ves. jun. 336, 350.

Where an appointment by will is void as having been made to strangers, if there be a gift of the residue of the property to be appointed to objects of the power, they will take the lapsed fund as part of the residue (*Falkner v. Butler*, Amb. 514; *Oke v. Heath*, 1 Ves. 135), even, it seems, although the gift of the residue is contingent upon an event which never happens. See *In re Meredith's Trusts*, 3 Ch.

D. 757; *In re Harries' Trusts*, John. 199; sed vide *Rateliffe v. Hampson*, 1 Jur., N. S. 1104.

But where there is a definite fund subject to a power of appointment by will amongst certain objects, and the testator appoints one sum, part of the fund, to a stranger to the power, and gives the "balance" of the fund to an object of the power, after a mere charge which fails in consequence of its being made in favour of persons not objects of the power, the object of the power will take the balance free from the charge; but will not take the sum the appointment of which was invalid in consequence of its being appointed to a stranger. This distinction is well illustrated in the case of *In re Jeaferson's Trusts*, 2 L. R., Eq. 276; there the testatrix appointed a legacy of 100*l.*, part of a definite fund, to a stranger to the power, and, after payment of legacies to objects of the power, appointed the balance amounting to 260*l.* to pay her own debts, and "should any surplus remain," she gave the same to E., an object of the power. It was held by Sir W. Page Wood, V. C., that the 100*l.* was unappointed, and did not pass to E., but that the 260*l.* was well appointed to E., freed from the charge of the debts, which failed as an invalid appointment.

Where an appointment is to a class, some of whom are within, and others not within the proper limits of the power, if the class of persons is ascertained, so that you can point to A., who is within the limits, and say so much is to go to

him, though the others are not within the limits, yet the appointment to A. shall take effect. *Harvey v. Stracey*, 1 Drew. 117; per Kindersley, V. C.

But if the appointment is to a class, some of whom may, and others may not be objects of the power, and there is nothing to point out what portion is to go to those who are within the power, and what to those who are not, the whole fails. *Ib.*; see *In re Brown's Trusts*, 1 L. R., Eq. 74.

As to the difference between an appointment exceeding the limits of a power and void for the excess only, and one which being a fraud on the power is void altogether, see *Agassiz v. Squire*, 18 Beav. 431, and 1 L. Cas. Eq. 310, 533, 5th ed.

Where there is an absolute appointment to an object of the power, and there is subsequently an attempt to cut it down, either by a gift to persons who are not objects or beyond the limits of the power, the person to whom the first appointment is made will take absolutely, and the subsequent gift will be void. See *Carver v. Bowles*, 2 Russ. & My. 304; *Kampf v. Jones*, 2 Keen, 756; *Re Lord Sondes' Will*, 2 Sm. & G. 416; *Lassence v. Tierney*, 1 Mac. & Gord. 551; 2 H. & T. 115; *Blacket v. Lamb*, 14 Beav. 482; *Stephens v. Gadsden*, 20 Beav. 463; *Gerrard v. Butler*, 20 Beav. 541. See also *Harvey v. Stracey*, 1 Drew. 73, 138; *Churchill v. Churchill*, 5 L. R., Eq. 44; *Kellett v. Kellett*, 3 L. R., H. L. 160, 169; *McDonald v. McDonald*, 2 L. R., H. L. (Sc. App.) 482, 488. In *Reid v. Reid*, 25 Beav. 469, where an appointment was made

to A. B., an object of the power, to be settled for her separate use, and to be divided, at her death, amongst her children; the gift to the children being void, they not being objects, it was held by Sir J. Romilly, M. R., that A. B. took for life only, and not an absolute interest ineffectually attempted to be cut down. See also *Harvey v. Stracey*, 1 Drew. 73.

And it has been decided in a recent case, that where there is an absolute appointment by will in favour of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed in a manner which the law will not allow, the will must be read as if all the passages in which such attempts are made were swept out of it, not only so far as they attempt to regulate the *quantum* of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election (*Woolridge v. Woolridge*, 1 Johns. 63. See also *Churchill v. Churchill*, 5 L. R., Eq. 44).

With regard to the doctrine of election upon an appointment to a person not being an object of the power, and a gift by the same instrument of other property to a person being an object of the power, see note to *Streatfield v. Streatfield*, 1 L. C. Eq. 388, 389, 5th ed.

Where there is a clear and definite gift of the property to be appointed, and then, engrafted upon that, subsequent provisions directing the fund to be settled, so as to

show that the purpose was, first, to make the gift to and for the benefit of the person named, and then to have the fund settled; in a case of that kind, if the limitations of the proposed settlement are such as cannot become operative, the first absolute gift is held to take effect without restriction. Per Sir W. Page Wood, V. C., in *Rucker v. Scholfield*, 2 H. & M. 41.

So, if there is a clear gift, followed by words which affect to divest it, and the limitations over are inoperative, then the Court will uphold the gift, striking out the limitations which cannot have any legal effect (per Sir W. Page Wood, V. C., in *Rucker v. Scholfield*, 2 H. & M. 41). But if the words of the original gift are coupled with the whole series of limitations over, so as to form one system of trusts, then all that can be done is to give effect to so much of the limitation as may be consistent with law. *Rucker v. Scholfield*, 2 H. & M. 41.

Where a person having a power to appoint to a fund delegates his power to another, and in default of appointment gives the fund among the objects of the power, it has been held, that, the delegation of the power to a third person being void, the gift to the objects in default of appointment will be good. *Ingram v. Ingram*, 2 Atk. 88.

Upon the same principle, where the donee of a power, after appointing a life interest to her daughter, an object of the power, delegated to her a power to appoint for life to her husband, not being an object of the power, and subject

thereto appointed the property to her daughter's children, who were objects of the power, it was held by Lord Romilly, M. R., that the will was to be read as if the words relating to the delegated power formed no part thereof, and that the appointment to the objects of the power was consequently good. *Carr v. Atkinson*, 14 L. R., Eq. 397; see also *Webb v. Sadler*, 8 L. R., Ch. App. 419.

Where the power authorizes the appointment of a remainder in fee to an object of a power, and there is an appointment by will to a stranger for life (not invalid, under the rule against perpetuities), with remainder to an object in fee, the life interest will be void, but the remainder will take effect, and the rents during the life of the stranger will go as in default of appointment. See *Crozier v. Crozier*, 3 Dru. & Warr. 353; 2 C. & L. 294; and the judgment of Lord Chancellor Sugden, where the authorities are reviewed in a most elaborate manner.

So where a father, having power to appoint a fund among his children, directed that it should not be divided amongst them until their mother's death, and that she should receive the dividends during her life, and apply the same, in the exercise of her sound discretion, for the best interest and advantage of his children, and that on her death there should be a division among the children in certain proportions, it was held by Sir L. Shadwell, V. C., that the direction that the wife was to receive the dividends during her life was void,

and that the same were payable as in default of appointment. *Chester v. Chadwick*, 13 Sim. 102.

Where, however, it appears to have been clearly the intention of the donee of the power, that the remainder should take effect at once on the determination of the prior estate, such remainder will be accelerated on such event taking place. See *Craven v. Brady*, 4 L. R., Eq. 209; 4 L. R., Ch. App. 296.

By the doctrine of *cy près*, or approximation, when the donee of a power has *by will* appointed to A. an object of the power for life, with remainder to his first and other sons who are *not objects*, A. will take an estate tail. Thus in *Pitt v. Jackson* (2 Bro. C. C. 51, cited 2 Ves. jun. 349), where on the marriage of A. money was by a settlement directed to be laid out in land, to be settled, after the death of the husband and wife, to the use of the children of the marriage, *subject to such powers, limitations and provisoes* as A. by deed or will should appoint. A. by his will gave part of the fund to the surviving trustee of the settlement, in trust to be laid out in real estate, to be conveyed in trust for his daughter during *her life* for her separate use, remainder to trustees to support contingent remainders, remainder *to all and every the child and children of his daughter, as tenants in common*, with remainders over. It was held by Sir Lloyd Kenyon, M. R., that, in order to effectuate the testator's general intention, the appointment ought to be considered to vest an estate tail in the daughter.

But the particular estate must be appointed for an estate of freehold, and not merely for a term of years determinable on lives. *Beard v. Wescott*, 5 Taunt. 393.

Although the doctrine of *cy près* has been followed (*Stackpoole v. Stackpoole*, 4 Dru. & Warr. 320; *Vanderplank v. King*, 3 Hare, 1; *Moneypenny v. Dering*, 2 De Gex, Mac. & Gord. 173), the Judges have felt no disposition to extend it. Consequently it has been held not to be applicable to *personal estate*. Thus if personal estate be first given by appointment to a parent, an object of the power, then equally or as he shall appoint to the children, who are not objects of the power, the intention of the appointor cannot be executed *cy près*, because in order to effectuate the intention the Court could only give it to the parent absolutely, and then it would not go in a course of descent, but would go to his executors, and be liable to his debts. In the case of real estate, it is true, the law enables the party to defeat the estate tail; but an act must be done by him for that purpose. If he dies without doing that act, the estate goes to his issue, but that is not the case as to personal estate. See *Routledge v. Dorril*, 2 Ves. jun. 357, 365; *Knight v. Ellis*, 2 Bro. C. C. 570; *Keiley v. Fowler*, Wilm. 298.

Nor, it seems, is the doctrine applicable to appointments of real and personal estate blended together. *Boughton v. James*, 1 Coll. 44.

Nor is the doctrine of *cy près* applicable, unless, by construction, the intention of the testator can be effectuated by enlarging the interest

of the tenant for life into an estate tail, so as by that means to carry over the benefit to his children by descent instead of by purchase. See *Bristow v. Warde*, 2 Ves. jun. 336; *Hale v. Pew*, 25 Beav. 335.

The doctrine of *cy près* is not applicable to appointments executed by deeds (see *Brudenell v. Elwes*, 1 East, 442, 451), where Lord Kenyon observed, "The doctrine of *cy près* goes to the utmost verge of the law, even in the construction of wills; and we must take care that it does not run wild. But it has never been applied to the construction of deeds. The cases cited were questions upon wills. Perhaps no person has carried the doctrine further than I did, when Master of the Rolls, sitting for the Lord Chancellor, in the case of *Pitt v. Jackson*. That also was the case of an appointment by will; and I know that great judges entertained considerable scruples at the time concerning that decision. It went indeed to the outside of the rules of construction; yet still I do not think it wrong." See also *S. C.* 7 Ves. 382; *Adams v. Adams*, Cowp. 651; 2 Chance on Powers, 62.

Nor it seems will the doctrine of *cy près* be applied to a case of election. *In re Dennehy's Estate*, 17 Ir. Ch. Rep. 97.

Where a limitation to an object of the power is *subsequent* to and *dependent* upon a gift which is void in consequence of its being conferred upon persons not objects of the power, such limitation, as is laid down in the principal case, will be void. Thus, in *Brudenell v. Elwes*, 1 East, 442, a lady, having power to revoke and limit new uses among

her children, exercised the power by deed, and appointed a life interest to her daughter, with remainder for life to her son, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male successively, with a similar remainder to another son and his male issue, *remainder to the daughter* in fee. The sons died without issue male. It was contended that the daughter took a vested remainder in fee under the appointment, inasmuch as though the execution of the power was void for the excess, viz. in the gifts to the issue of the sons, yet the subsequent limitation over to one who was an object of the power was good. Lord Kenyon, however, held that the life estate only of the daughter was good, and beyond that, the estate ought to go as in default of appointment. "The wife," said his Lordship, "had no power to appoint to the children of unborn children, but she was confined to execute her power among the children. So far, therefore, as she appointed an estate for life to the daughter with remainder for life to the son, she did well; beyond that she exceeded her power in appointing to the issue of the son, and therefore the excess is void. But it is equally clear that she did not intend that the subsequent limitation over to the daughter should be accelerated; but it was made to depend upon the intermediate limitations to the issue of her brothers, and she was not to take till their issue male was extinct. Those intermediate limitations, therefore, being void, the ultimate remainder dependent upon

them must also fall. If, then, the appointments were originally bad for excess, the subsequent circumstances of the death of the brothers, without having had issue, cannot make it good. The appointment must be legal at the time of its creation." See also *Robinson v. Harcastle*, 2 T. R. 241 ; 2 Bro. C. C. 22, 344 ; *Bailey v. Lloyd*, 5 Russ. 330 ; *Reid v. Reid*, 25 Beav. 469 ; by which *Doe v. Lord George Cavendish*, 4 T. R. 741, n., is overruled.

Where the first limitation is too remote, and therefore void, a subsequent limitation to an object of the power will not take effect, although the persons intended to take under the void limitation have actually failed. Sug. Pow. 508, 8th ed.

It has, however, been determined, that where a gift to an object of the power depends upon what has been termed "a contingency with a double aspect," and the contingency, which goes beyond the power, does not happen, it will not stand in the way of the person within the power, who may take under the appointment in the event which has happened. Thus in *Crompe v. Barrow*, 4 Ves. 681, where a lady, having power to appoint a sum of money among her children, gave a life interest to her son, and after his decease for such wife and children as he might leave behind him ; but in case he should die without leaving a wife or child him surviving, then, after his decease, to her daughter, an object of the power. It was held by Sir R. P. Arden, M. R., that the appointment to the son for his life was valid, that to his wife and children invalid, as not being well appointed

by the terms of the power ; and he declared that in case the son should die, without leaving a wife or child surviving, the same, according to the appointment, would belong to the daughter. It was suggested by counsel, that the ultimate limitation to the daughter depended upon the preceding estates given to the wife and children of the son, and must fall with them : as the will must receive its general construction from the death of the testatrix. His Honor, however, said, "I do construe the will at the death of the testatrix, and I think the ultimate appointment is good. If there is no wife or child of the son, the manner in which she has affected to execute the power never takes effect at all. I have determined in *Routledge v. Dorril*, according to *Robinson v. Harcastle*, that if you give for life to a child, who is an object of the power, and then to the children of that child, and, in failure of issue, to a person who is an object of the power, that is void ; but the distinction of this case from that is, that this limitation over to the daughter is, if the son should die without leaving a wife or child surviving. It fails, as far as it affects to give interests to the children ; but is there any occasion to make it fail upon the other point, the gift over to a person who is an object of the power ? Why am I to exclude the person taking over who has a right to take ? There are two alternatives :—if the son leaves no wife or children at his death, then the limitation over, being to a good object, takes effect ; if he does leave a wife or children,

then it cannot take effect." *Hewett v. Lord Dacre*, 2 Keen, 622.

If a fund is appointed to objects of the power, that is, if in that respect it is correct, the appointment will be valid, notwithstanding that the persons who are to take as appointees, or the shares and interest which they are to take under the appointment are made contingent upon a future event, provided the contingency must happen within the period prescribed by the rules relating to perpetuities; and if the fund is appointed not entirely to objects of the power, but partly to strangers, it will be still valid quoad those who are objects of the power, and the appointment will fail only as to those persons who not objects of the power. *Harvey v. Stracey*, 1 Drew. 136, per Kindersley, V. C.

An absolute appointment to an object of a power, with an executory gift over, in a given event, to a stranger, will cease upon the happening of the event, although the appointee is incapable of taking the estate. *Doe d. Blomfield v. Eyre*, 5 C. B. 713; 3 C. B. 557; see *Jackson v. Noble*, 2 Keen, 590; *Brown v. Nisbett*, 1 Cox, 13; *Webb v. Sadler*, 8 L. R., Ch. App. 419, 426.

A valid appointment may, however, be made to persons not objects of the power, with the concurrence of those who are objects; thus upon the marriage of a child, a parent, with power to appoint among his children, may with the consent of the child appoint to the intended husband and the issue of the marriage, and the appointment will be valid in equity. Ante, p. 398. *Rout-*

ledge v. Dorril, 2 Ves. jun. 357; *Langston v. Blackmore*, Amb. 289; *West v. Berney*, 1 Russ. & My. 431; and see *White v. St. Barbe*, 1 V. & B. 399; *Wade v. Paget*, 1 Bro. C. C. 364; *Irwin v. Irwin*, 10 Ir. Ch. Rep. 29.

In *Daniel v. Arkwright*, 2 Hem. & Mill. 95, under a power to appoint to children an appointment was made by deed poll to trustees upon the trusts of a contemporaneous settlement on the marriage of one of the daughters. This settlement, to which the daughter was a party, declared trusts for the daughter for life, with limitations over to the husband and the children of the marriage. It was held by Sir W. Page Wood, V. C., that the appointment was good, being equivalent to an appointment to the daughter and a settlement by her. See note to *Aleyn v. Belchier*, 1 L. C. Eq. 426, 5th ed.

These cases, in effect, decide, that what may be done by two deeds shall not fail because it is done by one, where it appears to have been done with the assent of all parties, who, perfectly knowing what their rights were, endeavoured to carry them into effect. In *re Gossett's Settlement*, 19 Beav. 529, 537.

But it seems it will not be sufficient for the child to be a party to the deed by which such appointment is made, if he do not execute or assent to it. *Brudenell v. Elwes*, 7 Ves. 382; *Tucker v. Sanger*, McClell. 424.

In a recent case an appointment made to a daughter while an infant and to her husband and children, not objects of the power, has been

held good upon the ground that the settlement was one of which the Court, if the infant had been a ward, would have approved of. *Fitzroy v. The Duke of Richmond*, 27 Beav. 190. See also *Wombwell v. Hanrott*, 14 Beav. 143; *Cunninghame v. Anstruther*, 2 L. R., Sco. App. 223, 224; *Roach v. Trood*, 3 Ch. D. 429.

Where, however, a parent has power under his marriage settlement to appoint only to children, he cannot without the concurrence of an unmarried daughter, after giving her a life interest, confer upon her a power of appointment by deed or will, and the appointment will be invalid, although the daughter should adopt it by exercising the power upon her marriage. See *Morgan v. Gronow*, 16 L. R., Eq. 1.

A subsequent appointment, however, may be made by the father, of the capital, to the daughter, who may then put it into settlement. *Ib.*

And a deed of confirmation executed by the father after a settlement made by the daughter may operate by way of re-appointment. *Ib.* 13. And see the observations there of Lord Selborne, L. C., sitting for the Master of the Rolls.

And by an extension of the principles before laid down, with the consent of an object of a power, a power, instead of an absolute interest, may be given to him under which he may appoint to persons not objects of the power. See *Goldsmid v. Goldsmid*, 2 Hare, 187. See also *Jebb v. Tugwell*, 7 De G. Mac. & G. 663; *Alloway v. Alloway*,

4 D. & War. 380; *Dickinson v. Mort*, 8 Hare, 178.

The principle upon which these cases proceed is not applicable where a father having power to appoint among children makes an appointment to a married daughter, her husband and children, for in such case the appointment, so far as it was made in favour of the husband and the children of the marriage who were not objects of the power, would be void. See *Daniel v. Arkwright*, 2 Hem. & Mill. 95, in which case, however, the Court, upon the ground of mistake on the part of the solicitor who drew the appointment, was able to rectify it by giving the sum appointed to the daughter absolutely. See also *In re Brown's Trust*, 1 L. R., Eq. 74.

Merely precatory words, requesting appointees to leave the property appointed, to other persons not objects of the power, will not raise a case of election. *Blacket v. Lamb*, 14 Beav. 482; *Kampf v. Jones*, 2 Keen, 756; *Carver v. Bowles*, 2 Russ. & My. 301.

So where a person appoints simply to objects of the power, and gives them property of his own, subsequently directing them to settle the property so appointed on persons not objects of the power, such direction will not raise a case of election (*King v. King*, 15 Ir. Ch. Rep. 479, overruling *Moriarty v. Moriarty*, 3 Ir. Ch. Rep. 26). Secus where there is a clause of forfeiture of the legacies on noncompliance with such direction. *Ib.*

And it has been recently decided that where there is an absolute

appointment by will in favour of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed in a manner which the law will not allow, the will must be read as if all the passages in which such attempts are made were swept out of it, not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election. *Woolrige v. Woolrige*, 1 Johns. 63. See also *Churchill v. Churchill*, 5 L. R., Eq. 44.

And in no instance has a case of election been raised where a testator gave no property absolutely his own to an object of a power out of which, in the event of his not acquiescing in an appointment by the donee to a person not an object of the power, the latter could be compensated. See *In re Fowler's Trust*, 27 Beav. 362. There a testator had an exclusive power of appointment over an estate to his children and grandchildren, and an exclusive power to appoint a fund among his children only. He appointed the estate to some of his children, and the fund to his children and to a grandchild (who was not an object of the power). It was held by Sir John Romilly, M. R., that this was not a case of election, and that the children were not compellable to elect either to give effect to the appointment of the fund to the grandchild, or reject the benefits appointed under the will. "A case of election," said his Honor, "arises

where a testator, whether under a power or not, gives property which belongs to one person to another, and gives to the former property of his, the testator's; in that case the former is bound to elect whether he will give effect to the disposition of his own estate in favour of the latter, and if he will not, then he cannot take any of the benefits intended for him by the will, and which are thereupon made available for compensating the disappointed legatee or devisee. This is not the case here, for there is *no property* of the testator. If the testator has improperly exercised the power, so that the property will go, as in default of appointment, it will be divisible amongst the seven children, five only of whom take benefits under this will, the other two are not named in it. It is impossible to say that there is a case of election as to the two who take nothing under the will, and it is equally so as to the others It is the same as if the two-tenths, which were appointed to one who was not an object, went over as in default of appointment, to persons who had nothing to do with the freehold estate."

Neither will the non-execution of a power upon an erroneous impression stated in the will, that by its non-execution one person who is a legatee, will divide the fund equally with another. *Langslow v. Langslow*, 21 Beav. 552.

It seems that where there is an attempt to create a power in violation of the rules of law, as for instance, the rule against perpetuities,

the Court will not aid such an attempt by the application of the doctrine of election. *Wallaston v. King*, 8 L. R., Eq. 165, 175.

Where a person appoints simply to objects of the power, and directs them to give or settle the property on persons not objects of the power (*Blacket v. Lamb*, 14 Beav. 482; and see *Warde v. Firmin*, 11 Sim. 235), or to pay them part of the sum appointed (*Rooke v. Rooke*, 2 Drew. & Sm. 38), such direction will be void.

But where the donee of a power by the same instrument confers a benefit out of property absolutely his own upon the appointee, the latter will be put to his election, and if he takes the benefit conferred upon him, he must comply with the directions, or if he declines to do so he must give up the benefits so far as may be necessary for compensating the persons disappointed by his election. Thus, for instance, where a man having a power to appoint to A. a fund, which, in default of appointment, is given to B., exercises the power in favour of C., and gives other benefits to B., although the execution is merely void, yet if B. will accept the gift to him, he must convey the estate to C., according to the appointment. Sug. Pow. 578, 8th ed.; *Whistler v. Webster*, 2 Ves. jnn. 267; *Reid v. Reid*, 25 Beav. 469; *Ex parte Bernard*, 6 Ir. Ch. Rep. 133; *Blacket v. Lamb*, 14 Beav. 482; *Tomkyns v. Blane*, 28 Beav. 422; *In re Dennehy's Estate*, 17 Ir. Ch. Rep. 97.

So, likewise, where a person has power to appoint to two, and he

appoints to one only, and gives a legacy to the other, that is a case of election. 2 Sugd. Pow. 148; *Woollen v. Tanner*, 5 Ves. 218; *Fane v. Lord Dungannon*, 2 S. & L. 118.

So where a person having a power to appoint, delegates the power (which he has really no right to do) to another, and by the same instrument confers benefits upon the objects of the power, they cannot retain the benefits given to them by the will, and also claim the property against the execution of the power so improperly delegated. *Ingram v. Ingram*, cited 1 Ves. 259.

An appointment will be invalid if made to an object of a power upon an arrangement with the appointor that the appointee will appoint the fund, or part of it, in favour of strangers and persons not objects of the power. This would in fact amount to a fraud upon the power. *Birley v. Birley*, 25 Beav. 299, commenting on *Tucker v. Sanger*, M'Clell. 424; *S. C.*, *Tucker v. Tucker*, 13 Price, 607; and see *Pryor v. Pryor*, 2 De G., J. & S. 205.

So an appointment by the donee of a power to an object "in payment of money lent" to the donee is void as a fraud on the power, the cancelling of the debt not being considered as a merely invalid condition annexed to the appointment. *Reid v. Reid*, 25 Beav. 469, 478, 479.

And where a father, having power to appoint a sum of money amongst his children, which they take in default of appointment, appoints part thereof to one of them, in "discharge" of a sum which he

has covenanted to pay on the trusts of his marriage settlement, such appointment will not satisfy the covenant, being an attempt by the father to pay his own debts out of the property of his children. *Graham v. Wickham*, 1 De G., J. & S. 474, 485.

II. *As to Excess in the Amount or Quantity of the Subject-matter of the Appointment.*

The principles which are applicable where there has been an excessive execution of a power with relation to its objects are also applicable where there is an excess in the amount or quantity of the subject-matter of the appointment. Thus, where a person had power to raise 7,000*l.* for younger children, and he charged the premises with 8,000*l.*; it was deemed in equity to be a good appointment for the amount of 7,000*l.*, the excess only being bad. *Parker v. Parker*, Gilb. Rep. 168.

So where a person had power to charge an estate with 2,000*l.*, to be raised *two* years after a term should come into possession, and he appointed it to be raised immediately. Lord Hardwicke said, that a mistake with respect to time of raising the sum would not make the appointment void. *Probert v. Morgan*, 1 Atk. 440, 441.

Again, where a person, having power to grant a lease for twenty-one years, grants one for twenty-six years, although in law it would have been void altogether (*Jenkins v. Kemische*, Hard. 398; *Roe v. Pri-deaux*, 10 East, 158), in a Court of Equity it would have been good for twenty-one years, and void only for

the excess, — “because,” as Sir Thomas Clarke, M. R., observes in the principal case, “it is a complete execution of the power, and it appears how much the appointor has exceeded it.” Ante, p. 401; see also *Parry v. Brown*, 2 Freem. 171; 3 Ch. Rep. 11; Nels. Ch. Rep. 87; *Anon.*, 2 Freem. 224; Barn. Ch. Rep. 11; *Campbell v. Leach*, Amb. 740.

Even at law it seems, where the excess was contained in a distinct and independent limitation, that alone would be void (*Adams v. Adams*, Cowp. 651; Fitz. 157; 2 S. & L. 332; *Commons v. Marshall*, 6 Bro. P. C. 168, Toml. Ed.; *S. C.*, Wall. by Lyne, 80, *nom. Lessee of Lord Netterville v. Marshall*; and see *Thomlinson v. Dighton*, 10 Mod. 31, 71); unless the two limitations made but one estate. See *Peters v. Masham*, Fitzg. 156, 157, where the two former propositions are well illustrated. “If,” says Chester, Serjeant, *arguendo*, “a power were given to make leases for twenty-one years, if the person who is to execute such power makes a lease for twenty-one years, and by the same deed limits a further interest in this manner, viz., *and from and after the term aforesaid, for one year more*, the power is well executed by the first limitation, and the excess is surplusage not to be regarded; so when the plaintiff’s husband gave her an estate for life expressly, the appointment was complete, and remainder limited to the heirs of her body was idle, and so to be rejected as not warranted by the power; sed *per Cur.* the cases differ, for in the principal case,

though the limitations are several and distinct, yet they make but one estate."

It is clear, according to the principles before laid down, that in a Court of Equity the argument of the learned serjeant would have prevailed.

Now, however, under the Judicature Act, 1873, the rule of equity will prevail. Sect. 26, sub-s. 11.

It seems, however, that at law, where the quantity of the estate to be given was marked out in the instruments containing the power, and it remained only for the donee to specify to what lands the estate is applicable, if he appointed a larger estate than that mentioned, as, for instance, an estate tail instead of an estate for life, although if it were considered as an execution of the power it would be void at law, it would be good as an appointment or designation of the lands, the estate taking effect under the instrument creating the power (*Peters v. Masham*, Fitzg. 156). And upon this principle, even had an inferior interest been limited, the appointee would have taken a life interest. *Ib.* 157. Fortescue, J., however, doubted whether a simple limitation of the lands would be good in such a case without a limitation of an estate; his remark, however, is contrary to the principle of the decision, and is not mentioned in his own report of the case. Fortesc. 339; nom. *Peters v. Morehead*. And see *Bland v. Bland*, 2 Cox, 349; *Kavanagh v. Morland*, Kay, 16.

Where there is a power to appoint a sum of money among a class, with a gift over in default of appointment,

and the donee of the power by will appoints to members of the class sums in the aggregate greater than the sum he had power to appoint, upon the death of one of the class to whom an appointment is made, the sum which thereby lapses will be applied so far as it will go in payment of the other appointees in full, and will not go to the persons entitled in default of appointment. *Eales v. Drake*, 1 Ch. D. 217.

III. *As to Conditions unauthorized by the Power being annexed to a Gift made under it.*

Where a condition not authorized by the power is annexed to a gift made in execution of a power, if the power be otherwise duly executed, the gift will be good and the condition void. Thus, for instance, if a father, with power of appointing 1,000*l.* amongst his children, executes the appointment, but annexes a condition that they shall release a debt owing to them, or pay money over, the appointment of the 1,000*l.* would be absolute, and the condition only void (per Sir Thomas Clarke, M. R., ante, p. 400. See also *Burleigh v. Pearson*, 1 Ves. 281; *Palsgrave v. Atkinson*, 1 Coll. 190; *Rooke v. Rooke*, 2 Drew. & Sm. 38; *Roach v. Trood*, 3 Ch. D. 429). So a direction to the trustees to deduct from the sums appointed debts due from the appointee (*Hewitt v. Lord Dacre*, 2 Keen, 622); that the appointee should not sell or dispose of his interest (*Palsgrave v. Atkinson*, 1 Coll. 190), or should make a settlement thereof (*Ib.* 190; *Watt v. Creyke*, 3 Sm. & Giff. 362); that payment should not

be made until a particular time, or on a particular event taking place (*Dillon v. Dillon*, 1 Ball & B. 77); that an additional sum should be raised out of an estate (*Roberts v. Dixall*, 2 Eq. Ca. Abr. 668, pl. 19; 2 Sugd. Pow. App. 16, nom. *Roberts v. Dixwell*); it has been held that the direction, not being authorized by the power, was void, and the gift valid. And see the case of *Sadler v. Pratt*, 5 Sim. 632, ante, p. 405; *Stroud v. Norman*, Kay, 313; *Stuart v. Lord Castle Stuart*, 8 Ir. Ch. Rep. 408; and see 1 Drew. 130; *Grogan v. Dopping*, 6 Ir. Ch. Rep. 265; *Fry v. Capper*, Kay, 163.

So where a donee of a power, having authority by will to appoint an estate amongst his children, devises the estate amongst or in trust for his children subject to the payment of his debts, the charge of debts will be void, but the children will take the estate. See *Coux v. Foster*, 1 J. & H. 30, there a testator having power to appoint realty among his children devised and bequeathed all his real and personal estate whatsoever whereof he had power to dispose, upon trust to sell the realty and give valid discharges to purchasers, and to apply the proceeds of the realty and the personalty in payment of his debts, funeral and testamentary expenses, and then among his children in certain specified shares. It did not appear whether the personal estate was sufficient for the debts and funeral and testamentary expenses, but the testator had no real estate of his own, except a contingent reversion in the subject of the power. It was held by Sir W. Page Wood,

V.C., that though the debts and expenses could not be paid out of the settled estate, the appointment was not thereby invalidated. "There can be no doubt," said his Honor, "that this is in substance a trust for children, and not an appointment in favour of creditors. There is an attempt to impose a burden which the children are not bound to bear, but there is no difficulty as to the proportions in which they are to take." See also *Bailey v. Lloyd*, 5 Russ. 330; *Richardson v. Simpson*, 3 Jo. & Lat. 540; and *Ferrier v. Jay*, 10 L. R., Eq. 550, overruling *Clogstoun v. Walcott*, 13 Sim. 523.

If an appointment to a daughter is clogged with a restriction against anticipation which might tend to a perpetuity, the interest for life would be well appointed but the restriction void (*Fry v. Capper*, Kay, 163; Sugd. Pow. 526, 8th ed.). Secus, where the restriction does not tend to a perpetuity. *Dickinson v. Mort*, 8 Hare, 178.

Where, however, a father having power to appoint portions to younger children appointed a sum to a younger son, upon condition that he should have paid off and discharged a debt of his own for which the father was security, and that the creditor should have released the father's estate and effects from the said debt, but, in case the son should not have paid the debt and the creditor should not have released the same, the sum conditionally given to the son should be considered as unappointed, it was held that the appointment was valid. The object of the appointor being not to obtain any benefit for

himself, but to prevent the injustice to his other children of having that which was not the appointor's own debt paid out of his general property. *Stuart v. Castlestuart*, 8 Ir. Ch. Rep. 408, 418. See also *Coffin v. Cooper*, 2 Drew. & Sm. 365.

Although it is clear that where there is a power of appointment enabling the donee to distribute a fund, if an appointment be made with a condition attached, to be performed by the party to whom the appointment be made, not within the scope of the power, the appointment will be good, and the condition void; nevertheless where an absolute power of appointment and selection in favour of children is given, there may be a conditional limitation over of one share in favour of other objects of the power, on a certain event specified in the appointment. *Stroud v. Norman*, Kay, 313. See also *Trollope v. Routledge*, 1 De G. & Sm. 662; *Caulfield v. Maguire*, 2 J. & L. 170.

The general principle upon which these cases proceed, to use the words of Sir J. Clarke, M. R., in the principal case, is, "that where there is a complete execution of the power, and something *ex abundanti* is added, which is improper, if the boundaries between the excess and proper execution are precise and apparent, there the execution shall be good and only the excess void." Ante, p. 401.

Where there is a void condition attached to an absolute appointment in favour of an object of a power, as for instance, that he should release a mortgage debt,

although he might claim the benefit of the absolute appointment in his favour, and have treated as void the condition attempted to be imposed upon him; nevertheless, if he assents to the condition by executing a release of the mortgage debt, the appointment not being obnoxious to the charge of fraud, he will be bound by his own voluntary act. *Roach v. Trood*, 3 Ch. D. 429.

Where, however, the gift under the appointment cannot be separated from a void condition, the gift will altogether fail. Thus in *Hay v. Watkins*, 3 Dru. & Warr. 339, where the appointee, after reciting by his will his power, bequeathed as follows:—"I leave and bequeath unto my daughter Harriett a further sum of 200*l.*, to have me properly buried in this island, and to pay what small debts I may owe in this island at my decease;" it was held by Lord St. Leonards, then Lord Chancellor of Ireland, that the appointment was bad, and that the 200*l.* was to go as if unappointed. "Can it be argued," said his Lordship, "that it was intended that this lady was to take this sum of 200*l.*, and comply with neither of the conditions? that, however, may be said of every such case." His Lordship apparently does not put the case upon this ground, for similar reasoning would apply to almost every case which has been before cited, where the condition was held void, and the gift good, although it must have been the intention of the appointee in imposing the condition to have expected its fulfilment. His Lord-

ship then goes on to give a more satisfactory reason for the decision. "But, still further, here it is difficult to separate the gift from the condition, they constitute an entire gift. . . . It is like the case of a legacy, where there is no gift except in the direction to pay. I cannot separate the gift from the condition, and therefore must hold the appointment to be bad. I believe this to be the soundest construction, although I do not think the case free from difficulty." See also *Webb v. Sadler*, 8 L. R., Ch. App. 419; there a husband and wife having under their marriage settlement a joint power of appointment over personalty in favour of the children of the marriage, of whom there were three survivors, appointed one-third of the fund to trustees, upon such trusts as H. (one of the sons) by deed *executed, with the consent of the father during his life*, and, after his death, with the consent of the *trustees of his will*, or by will should appoint; and in default of such appointment, upon trust for H. for life, or until bankruptcy or assignment (such bankruptcy or assignment being limited to twenty-one years after the death of his surviving parent); and, after H.'s death, upon trust for his executors or administrators, as part of his personal estate; but if such interest should be previously determined, then upon the trusts therein mentioned. It was held by the Court of Appeal in Chancery, varying the decision of Sir James Bacon, V. C., reported 14 L. R., Eq. 533, that the appointment to such uses as H. should appoint, with the

consent of the trustees, was void, but that the limitation over in default of appointment by H. was valid, and gave H. an absolute interest in the share, subject to the contingency of his committing a forfeiture within the prescribed period. Sed vide *In re Brown's Trusts*, 1 L. R., Eq. 74.

The result will be the same where the void condition is precedent. *Richardson v. Simpson*, 3 J. & L. 540.

IV. *Where a Power executed substantially, though not strictly modo et formâ, is valid in Equity as not being excessive.*

If an appointment be substantially executed according to the intention of the donor, it has in many cases been held good in equity, though not strictly *modo et formâ*, the excess in the execution not being sufficient to render it invalid. It has, for instance, been long settled that a power to appoint in favour of a particular person can be well executed in equity by an appointment to trustees for that person.

Thus, although a conveyance to trustees upon trust to pay a rent-charge to an intended wife is not a good *legal* execution of a power to limit a jointure to her, as they are not objects of the power (*Hervey v. Hervey*, 1 Atk. 561), nevertheless it would be made good in equity; and although the heir at law, had he brought an ejectment, might have succeeded in law, a Court of Equity would have given relief to the jointress. *Churchman v. Harvey*,

Amb. 341, 824; *Crozier v. Crozier*, 3 Dru. & Warr. 353, 371.

The creation, however, of a term of 500 years in trustees upon trust for the objects of the power, has been held to be a good legal exercise of a power to appoint for such estate or estates, in such parts, shares and proportions, and in such manner and form as the appointor should think fit. *Trollope v. Linton*, 1 S. & S. 477, 485.

Where a person having a special power of appointment over a real or personal property, appoints to trustees for the objects of the power, the exercise of the power will be valid, notwithstanding the interposition of trustees. *Thornton v. Bright*, 2 My. & Cr. 230; *Busk v. Aldam*, 19 L. R., Eq. 16; and see *Re Philbrick*, 34 L. J., Ch. 368.

But the Court will not, as a matter of right, transfer a fund of personalty so appointed to the trustees interposed by the donee of the power. See *Busk v. Aldam*, 19 L. R., Eq. 16; where Sir R. Malins, V. C., after noticing the cases which decide that an appointment to trustees to sell and convert and distribute the proceeds among the objects of the power is a valid execution of the power, adds, "But I am unable to see how that can be an authority for taking away a fund from trustees who are fit and proper, and handing it over to others who may not be so fit, in a case where the duty of the trustees is simply to hold the fund."

But where there was a general and a special power, and an appointment was made of the funds comprehended under both powers,

together to trustees to pay debts, and to apply the residue for the objects of the special power, it was held that the appointment must be read *reddendo singula singulis*, and the fund coming under the general power applied in the first instance to the purposes by which the fund subject to the special power was not applicable. *Ferrier v. Jay*, 10 L. R., Eq. 550, overruling *Clogstown v. Walcott*, 10 L. R., Eq. 550.

Where a donee has power to appoint an estate absolutely, a devise to trustees on trust to sell and divide the proceeds among the objects of the power, has been held to be a good appointment. *Kenworthy v. Bate*, 6 Ves. 793; *Crozier v. Crozier*, 3 Dru. & Warr. 371; *Hervey v. Hervey*, 1 Atk. 561; *Churchman v. Harvey*, Amb. 339; *Trollope v. Linton*, 1 S. & S. 477; *Cowx v. Foster*, 1 J. & H. 30; *Fowler v. Cohn*, 21 Beav. 360; *D'Abbadie v. Bizoin*, 5 I. R., Eq. 205.

So an unlimited power to charge an estate has been held in equity to authorize a disposition of the estate itself in trust to sell and divide the money among the objects (*Long v. Long*, 5 Ves. 445). So a power to appoint and divide the land enables the donee of the power to charge a sum of money on the land. *Roberts v. Dixall*, 2 Eq. Ca. Abr. 668; *Thwaytes v. Dye*, 2 Vern. 80.

And where there was a limitation to the use of the children of A. for such estate or estates, and in such parts, shares and proportions, manner and form as A. should appoint, an appointment of a rentcharge to

one child, and the estate, subject thereto to another, was held good. *Ricketts v. Loftus*, 4 Y. & C., Ex. Ca. 519.

A power to appoint an estate directed to be bought with money to arise from the sale of another estate directed to be sold, may be exercised over the estate directed to be sold in the same manner as it might be over the estate directed to be purchased. *Bullock v. Fladgate*, 1 V. & B. 471. See also *Pearson v. Lane*, 17 Ves. 101.

A power to appoint the fee authorizes the appointment of a smaller estate as an estate for life (*Bovey v. Smith*, 1 Vern. 85), or any lesser estate which may be limited out of a fee (*Crozier v. Crozier*, 3 Dru. & Warr. 353, 370); and a power to appoint among a class authorizes an appointment to an object for life, with remainder to others, and with cross gifts between and among them. *Alloway v. Alloway*, 4 Dru. & War. 387; *Wilson v. Wilson*, 21 Beav. 25.

Where there is a power to appoint a mixed fund of realty and personalty among a class, it is not essential to the validity of an appointment, that each of the objects should have a part of each kind of property; the realty may be appointed to one of the class and the personalty to the others. *Morgan d. Surman v. Surman*, 1 Taunt. 289.

And where a person has power to appoint realty among a class, as, for instance children, on such trusts as he pleases, he may devise the realty to trustees upon trusts to sell and give receipts, previous to division among the children in the shares

appointed to them. *Cowx v. Foster*, 1 J. & H. 30; and see *Cox v. Cox*, 1 K. & J. 251; *Webb v. Sädler*, 14 L. R., Eq. 533; 8 L. R., Ch. App. 419.

In the principal case under a power to appoint personalty in such proportions as the donee should direct, an appointment to an object to her *separate use* was held good. See also *Dickinson v. Mort*, 8 Hare, 178.

A power to charge a sum in gross, implies a power to give interest (*Roe v. Pogson*, 2 Madd. 457; *Lewis v. Freke*, 2 Ves. jun. 512); and where the sum appointed is vested and severed from the residue it will carry interest (*Dundas v. Wolfe Murray*, 1 H. & M. 425); but if the sum is only to be raised on the happening of some contingent event, no interest will in the meantime be payable. *Gotch v. Foster*, 5 L. R., Eq. 311.

An unlimited power to appoint the dividends of a fund will authorize the appointment of the fund itself (*Phillips v. Brydon*, 26 Beav. 77); and a discretionary power to trustees to lay out a fund in purchasing an irredeemable annuity for an object of the power, will be well exercised by giving him the whole fund (*Messeena v. Carr*, 9 L. R., Eq. 260), and well exercised pro tanto by giving him part thereof. *Ib.*

A donee having a power of appointing a fund among his children, in such manner and proportion as he pleases, after appointing the fund equally among his children, will not invalidate the appointment by postponing the payment of the

capital, partly until the majority of his children, and partly until after the death or marriage of his last surviving unmarried daughter, the unmarried daughters in meantime being entitled to the income. *Wilson v. Wilson*, 21 Beav. 25.

As to the re-exercise of a Power improperly executed.

If a person exercise a power improperly, so that his execution of it is void, and he subsequently discovers his error, he may then exercise the power in the manner warranted by the law (per Lord St. Leonards in *Jackson v. Jackson*,

1 Dru. 120; *Ward v. Tyrrell*, 25 Beav. 563).

So where a power is given to a wife surviving, she may exercise the power in respect of any portion of the fund, either not appointed by the husband or not validly appointed. *Ex parte Bernard*, 6 Ir. Ch. Rep. 133, 137; *Mapleton v. Mapleton*, 4 Drew. 515.

As to whether a donee having made an appointment set aside as a fraud on the power can again exercise his power. See *The Duke of Portland v. Topham*, 11 H. L. Ca. 32; *Hutchins v. Hutchins*, 10 I. R., Eq. 453, 457; note to *Aleyn v. Belchier*, 1 L. C. Eq. 438, 5th ed.

THOMAS CADELL *Appellant* ;

ARTHUR PALMER, CHARLES CADELL	} <i>Respondents.</i>
EDRIDGE, HENRY BENGOUGH,	
HENRY RICKETTS the Younger, RICH-	
ARD RICKETTS the Younger, WILLIAM	
IGNATIUS OKELY and ANN ELIZA-	
BETH his Wife, late ANN ELIZABETH	
BENGOUGH, Spinster, and ANN RICK-	
ETTS the Younger, WILLIAM PETER	
LUNELL, JOHN EVANS LUNELL,	
GEORGE LUNELL, SARAH BEN-	
GOUGH and GEORGE BENGOUGH. . .	

—◆—

Feb. 15, 1832 ; May 20 and June 25, 1833.

[REPORTED 1 CLARK & FINNELLY, 372.]

EXECUTORY DEVISE—PERPETUITY.]—*A limitation, by way of executory devise, which is not to take effect until after the determination of a life or lives in being, and a term of twenty-one years, as a term in gross and without reference to the infancy of any person, is a valid limitation. Secus, if to the term in gross of twenty-one years be added the number of months equal to the longest or ordinary period of gestation.*

This being held to be the established rule, a decree of the Court below, declaring that a limitation by way of executory devise, which was not to rest until after the expiration of a term in gross of twenty years from the decease of the survivor of twenty-eight persons, who were living at the testator's decease, and of whom seven only were to take interests under the devise, is a valid limitation, was affirmed accordingly.

HENRY BENGOUGH, Esq., by his will, dated the 9th day of April, 1818, gave and devised, from and after the decease of his wife

Joanna Bengough, his messuage, with the gardens, stables and other appurtenances belonging thereto, situate in St. James's Square, Bristol, to the Rev. Charles Lucas Edridge, Arthur Palmer, the Rev. Cadell Edridge and George Wright, their heirs and assigns for ever, upon trust, for sale; and directed the proceeds to sink into and become part of his personal estate. He further gave and devised to the said trustees, their heirs and assigns, certain other real estates, upon trust, to permit his wife to occupy a part thereof during her life, and, after her decease, to pay out of the rents and profits an annuity of 300*l.* to his nephew George Bengough for life, and an annuity of 200*l.* to his nephew Henry Bengough for life, and subject to the payment of the said annuities, and otherwise subject, as in the said will mentioned, upon trust, from time to time, during the term of twenty-one years, to be computed from the day of the testator's decease, to collect and receive the rents and profits of all his real estates so devised to them (except the house in St. James's Square), and from time to time, during the continuance of the said term, to lay out the monies to arise from such rents and profits in the purchase of freehold estates of inheritance, in England, when and as often as there should be a surplus in hand amounting to the sum of 1,500*l.* And he directed the estates so to be purchased, to be conveyed to the trustees, upon the same trusts and conditions as were thereafter (a) limited concerning his estates thereinbefore devised; and that the trustees should not permit more than 500*l.* to remain in banker's hands, but should invest the same in the Three per Cent. Consolidated Bank Annuities, until a convenient purchase could be found, and add the interest to the principal, to accumulate during the said term in the same manner as the rents and profits of the real estates were before directed to accumulate; and as to all the said trust estates and hereditaments so by him thereby devised (except his said messuage in St. James's Square), upon trust, that the trustees for the time being should retain and stand possessed of the same during the term of 120 years, to commence from his death, if his said nephews George Bengough and Henry Bengough, his nephew James Bengough, his great-nephews Henry Ricketts the younger and Richard Ricketts the younger, his niece Ann Elizabeth Ben-

(a) See the report of this case under the title of *Bengough v. Edridge*, 1 Sim. 273, where the Vice-Chancellor ordered "here-

inbefore" to be substituted for "hereinafter." That part of the decree is not appealed from.

gough, his great-niece Ann Ricketts the younger, the ten children then living of the said Charles Lucas Edridge (for whose names a blank was left in the will), and the eleven children then living of the said Arthur Palmer (whose names were mentioned), or any or either of his said nephews and niece, and great-nephews and great-niece, or any or either of the said several children of the said Charles Lucas Edridge and Arthur Palmer, should so long live; and also during the term of twenty years, to be computed from the expiration or other sooner determination of the said term of 120 years determinable as aforesaid, nevertheless upon trust for his said nephew George Bengough, for a term of ninety-nine years, if he should so long live, and the said terms of 120 years and twenty years, or either of them, should so long continue; and from and after the expiration or other sooner determination of the said term of ninety-nine years, then in trust for the first, second, third, fourth, fifth, sixth and all and every other and subsequent born son of the same George Bengough, severally and successively, according to the priority of their births: and after the determination of the estate and interest of each of the same sons respectively, and also, as the circumstances of the case should require, after the determination of the estate of any person taking from time to time under, or as answering the description of heir male of his body, in trust for the person who for the time being and from time to time should answer the description of heir male of his body, or who in case of the death of his parent, if such death had taken place, would be heir male of his body, under an estate tail limited to the same son and the heirs male of his body, to hold to the same son or person respectively for a term of ninety-nine years, if the same son or person respectively should so long live, and the said terms of 120 years and twenty years, or either of them, should so long continue; every elder of the same sons and the person who for the time being and from time to time should answer, or who in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body, to be preferred before every younger of the same sons, and the person who for the time being should answer, or in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body.

The testator then declared several successive trusts of the said

estates during the said terms of 120 years and twenty years, in favour of his nephews Henry Bengough and James Bengough, his great-nephews Henry Ricketts the younger and Richard Ricketts the younger, his niece Ann Elizabeth Bengough, and his great-niece Ann Ricketts the younger, respectively, and their respective first and other subsequent born sons, and of the persons who for the time being should be, or who in case of the death of their respective parents would be heirs male of such sons respectively, similar to the trusts before stated to have been declared in favour of the said George Bengough, and his first and other subsequent born sons, and of the person who for the time being should be, or who in case of the death of his parent would be heir male of the body of each of the same sons respectively, except that he directed that the estates of the said *Henry Ricketts* and *Richard Ricketts*, and of their respective sons, and of the person or persons answering the description of heirs male or heir male of their respective bodies, and also the estates of the said Ann Elizabeth Bengough and Ann Ricketts, and of their respective husbands, and of their first and other sons, and of the persons answering the description of heirs male of their respective bodies, should respectively cease, if he or they for the time being should refuse to take the surname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the income of the said trust estates. And from and after the determination of the said respective estates and interests, then in trust for the person or persons respectively, who for the time being, and from time to time, should answer the description of the testator's heir or right heir-at-law; and if there should be more than one, in the same proportions as they would be entitled to a real estate descending from the testator as the first purchaser, and vesting in him or them as his right heirs, to hold to the same person or persons respectively, if more than one, as tenants in common, as to each of the same persons respectively, for a term of ninety-nine years, if the same person should so long live, and the said terms of 120 years and twenty years, or either of them, should so long continue.

The testator further directed that each of the said terms of ninety-nine years should be computed from the time when the person or persons respectively to whom the same were limited should become entitled to the income of all or any part of the said trust estates,

under the limitations thereinbefore contained; and that in case the said limitations in favour of persons unborn could not take effect precisely in the order in which they were directed, and there should consequently be any suspension of the beneficial ownership, by reason that the persons entitled to take under the same limitations or trusts should not be then born, in that case the income of his said devised trust estates should, during such suspension of ownership, belong to and be enjoyed by the person or persons for the time being entitled, or who, in case there had not been such suspension of ownership, would for the time being have been entitled to the next estate in remainder, subject nevertheless to the right of any person or persons to be afterwards born, and who would have been entitled, under any prior limitation, to receive the income of his said trust estates from his, her or their actual birth or respective births.

The testator then directed, that after the expiration or sooner determination of the said terms of 120 years and twenty years, his said trust estates should be conveyed and assured by his then trustee or trustees thereof, to such person or persons as would at that time be entitled to the same, either by purchase or by descent, for the first or immediate estate or estates for life, in tail, or in fee in them, if the same had by his will been devised, settled or assured to the use of his nephew, the said George Bengough, and his assigns for his life, with remainder to his first and other sons successively, according to the priority of their births in tail male, with remainder in similar estates for life, and remainders in succession to the said Henry Bengough, James Bengough, Ann Ricketts, Richard Ricketts, Ann Elizabeth Bengough, Ann Ricketts, and their sons respectively, with a proviso for the cesser of the estates of the said Henry Ricketts and Richard Ricketts, and their respective first and other sons, and the heirs male of their respective bodies, who for the time being should refuse to take the surname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the said income; and also for the cesser of the estate of the said Ann Elizabeth Bengough and Ann Ricketts, and their respective husbands, and their first and other sons, and the heirs male of their respective bodies, who for the time being should make a like refusal, with reversion to the testator's own right heirs. And he further directed, that the person or persons to whom such conveyances should be made, should have

such estate in the said trust estates, as he or they would at that time be entitled to take under the said limitations, if the same had been actually made by his will, with the same or the like remainders over, as if the said trust estates had been devised by his will in manner aforesaid, or as near thereto as might be, and the circumstances of the case and the rules of law and equity would permit; yet, nevertheless, that no such person should have or be entitled to a vested estate or any other than a contingent interest, until the expiration or sooner determination of the terms of 120 years and twenty years; and he declared that such limitations were introduced into his will only for the purpose of ascertaining the objects to whom such conveyances should be made, and not for the purpose of making any immediate devise or gifts, or raising any immediate or present estate by way of trust or otherwise for them; on the contrary thereof, he directed that during the said terms of 120 years and twenty years, no person or persons should be entitled, at law or in equity, to any beneficial estate in his said trust estates, or the income thereof, by way of vested interest, for any longer period than ninety-nine years, determinable as before mentioned, and that, in the events and in the mode before expressed, heirs or heirs of the body should be entitled to take in the first instance, and as purchasers in their own right. And he directed, that, if at any time during the said terms of 120 years and twenty years each of the male persons who for the time being should be entitled to the income of his said trust estates should require the same, it should be lawful for his trustees to convey to each or any person making such request the said trust estates, or part thereof, as he should be entitled to under the limitations thereinbefore contained, for an estate of freehold for the life of the same person, so as to give him or her an estate of freehold, instead of an estate for ninety-nine years.

The testator, after giving various other directions and powers concerning the said trust estates, and after bequeathing several legacies and annuities, gave and bequeathed to the said trustees, their executors and administrators, all the residue of his personal estate whatsoever, upon trust that they should either continue his monies upon the securities upon which they should be invested at his decease, or call in the same, and sell all such parts of his residuary estate and effects as should not consist of money or securities for money. And he directed, that, during the term of twenty-one years, to be computed

from the day of his decease, the trustees for the time being of his will should receive the dividends, interest and annual income of all his residuary estate, and from time to time during such term invest all such dividends, interest and income, and the accumulations of the same, in their names, either in the Three per Cent. Consolidated Bank Annuities, or upon mortgages of freehold hereditaments in Great Britain, as they should think proper, as an accumulating fund, in order to increase the principal of his residuary estate during such term of twenty-one years; and should, with all convenient speed, from time to time during that term, lay out and invest all his residuary estate and effects, and all accumulations thereof, in purchases of freehold hereditaments of an estate of inheritance in fee simple in England and Wales, when eligible purchases should arise; which estates, so to be purchased, should be conveyed unto and to the use of the trustees, in fee, upon the same trusts and under and subject to the same and the like powers, provisoes and limitations as were by him thereinbefore declared concerning his said estates devised to them in trust as thereinbefore mentioned, or as near thereto as the death of parties, the change of interests and other contingencies would admit; and he appointed his said trustees to be executors of his said will.

The testator died in April, 1818, and his three first-named trustees and executors shortly afterwards proved his will, and became his legal personal representatives, George Wright having renounced probate and executed a deed of disclaimer to them as to the trust estates.

Ann Ricketts, the testator's only sister, and next of kin at the time of his death, died in the month of October, 1819, having by her will appointed the respondents, W. P. Lunell, J. E. Lunell and George Lunell, executors thereof; and they proved the same, and became her legal personal representatives.

Mrs. Bengough, the testator's widow, died on the 10th of June, 1821, having duly made and published her will, and appointed as executors thereof the said Rev. Charles Edridge (since deceased) and Thomas Cadell, the appellant, who duly proved the same, and thereby became her legal personal representatives.

George Bengough, the testator's nephew, and first taker of an estate under the limitations in the will, filed his bill in Chancery in the year 1821 (amended in 1823) against the acting trustees and executors, and against the said Henry and James Bengough, Henry and Richard

Ricketts, Ann Bengough and Ann Ricketts the younger, and also against the said personal representatives of Joanna Bengough the widow, and of Ann Ricketts, the sister of the testator ; and after stating the said will, and his own rights under it, and as heir-at-law and one of the then next of kin of the testator, he prayed (amongst other things) that the will might be declared to be well proved, and that the trusts thereof, so far as the same were good in law, might be decreed to be carried into execution, and that an account might be taken of the personal estate and effects of the testator, and of his funeral and testamentary expenses and debts and legacies ; and that the clear residue of the personal estate might be applied upon the trusts of the will, so far as the same were effectual in law ; and as far as the same were ineffectual in law, then to such person or persons as would in such case by law be entitled thereto ; and that an account might be taken of the testator's real estates and of the rents received by the trustees, and that what should be found due from them on taking that account might be applied upon the trusts of the will, as far as the same were good in law ; and that the Court would be pleased to declare how far the trusts of the real and personal estate were good ; and, as far as the trusts were declared to be void, that the plaintiff might be declared to be entitled to the real estate ; but in case the trusts of the will should be considered valid, then that such of the rents and profits of the estates devised to the trustees in possession, as accrued during the life of Mrs. Bengough, might be applied in the purchase of freehold estates of inheritance in England or Wales, and that the annuities of the plaintiff and Henry Bengough might be paid out of the rents and profits that had accrued and should accrue after her death ; and that the residue thereof might, during the remainder of the term of twenty-one years, be also applied in the purchase of freehold estates of inheritance in England or Wales ; and that such estates, when purchased, might be conveyed to the trustees upon the trusts declared of the estates so to be purchased ; and that, as often as there should be the sum of 1,500*l.* arising from the rents and profits of the devised estates, it might be laid out in such purchases of freehold estates as aforesaid ; and that the plaintiff might be declared to be entitled to the immediate possession and enjoyment of the said estates so to be purchased for the term of ninety-nine years, if the plaintiff should so long

live, such term to be computed from the death of the testator; and that in case the said rents and profits should not, as soon as they amounted to 1,500*l.*, be so laid out, the plaintiff might be declared entitled to the interest and dividends thereof from the time the same amounted to 1,500*l.* until the same should be laid out in the purchase of freehold estates; or that, in case the said trusts were partly valid and partly invalid, then that proper directions might be given for effectuating such of the trusts as were valid, and for declaring and effectuating the rights of the persons entitled, so far as the trusts were invalid.

The defendants having put in their answer to the bill, the cause came on to be heard before the Vice-Chancellor in 1823, when an order of reference was made to the Master, who, in pursuance thereof, reported that the plaintiff was, at the time of the death of the testator, and then was, the heir-at-law of the said testator; and that the said Ann Ricketts, deceased, the sister of the said testator, was his only next of kin at the time of his death, and that William P. Lunell, J. E. Lunell and George Lunell, were then her legal personal representatives, and the only persons who, together with the plaintiff and the said Henry Bengough, James Bengough and Ann Elizabeth Bengough (the children of the said testator's late brother, George Bengough), and the said Charles Lucas Edridge, and the appellant, the executors of Joanna Bengough, the widow of the said testator, would, in case of intestacy, have been entitled to distributive shares of the personal estate of the testator.

Upon the death of James Bengough the suit was revived against Sarah Bengough, his widow and personal representative; and William Ignatius Okely, having married Ann Elizabeth Bengough, was subsequently made a party to the suit.

The cause having come on to be heard on further directions, before the Vice-Chancellor, his Honor, by a decree, bearing date the 24th day of January, 1827, ordered it to be declared (amongst other things) that the testator's said will ought to be established, and the trusts thereof carried into execution, &c. His Honor, in giving his judgment in respect of that part of his decree, said, "that although the rule of law be framed by analogy to the case of a strict settlement, where the twenty-one years were allowed in respect of the infancy of a tenant in tail, yet he considered it to be fully settled,

that limitations by way of devise or springing use might be made to depend upon an absolute term of twenty-one years after lives in being (*b*)."

From this part of the decree the personal representative of the testator's widow appealed to the House of Lords, and the appeal came on for hearing in February, 1832.

Sir *Edward Sugden* and Mr. *Lynch*, for the appellant, argued to the following effect:—The testator in this case had two objects in view; first, to suspend the vesting of the inheritance for a period of 120 years, determinable upon twenty-eight lives, and for an absolute term of twenty years from the death of the survivor of them, being, as he conceived, within the rule of law against perpetuity. His second object was, during this period of suspension of the inheritance (after a period of twenty-one years allotted for accumulation), to confer the enjoyment of the estate upon, 1st, his nephew, G. Bengough, for a period of ninety-nine years, determinable on his life, and the said terms of 120 years and twenty years, with remainder to his son (not born at the testator's decease), for a like period of ninety-nine years, determinable on his life, &c., with remainder to the grandson of his said nephew for a like period, determinable on his life, &c., with remainder to the great-grandson of his said nephew for a like period, determinable on his life, &c.; and so on, in respect of all the heirs male of the body of his nephew George, all taking as purchasers, and all taking estates only for ninety-nine years, determinable on their lives respectively, and on the terms of 120 years and twenty years. And he conferred similar limitations on his nephew Henry, and the heirs male of his body, &c.; and on his third nephew, and the heirs male of his body, &c.; these being the persons that would take in case the inheritance was not suspended, and being the persons to whom the inheritance is to be conveyed when the suspension is to cease, and to whom at any time the trustees may limit an estate of freehold. We submit that the whole machinery of this will is a *fraud on the rule of law against perpetuity*. The accumulation is taken for the whole term of twenty-one years, allowed by the *Thellusson Act* (*c*), and without reference to any minority or any legitimate object of settlement; and it is not until the expiration of

(*b*) *Bengough v. Edridge*, 1 Sim. 267.

(*c*) 39 & 40 Geo. 3, c. 98.

that term that the limitations are made to commence. Accumulation and executory limitations were, by the law as it stood before the Thellusson Act, co-extensive ; but a testator could not first accumulate for lives in being and twenty-one years, and then postpone the vesting for a like further period. The limitation of the estates for 120 years, if twenty-eight persons, or any or either of them, shall so long live, taken by itself, is not objected to ; but there is added a term in gross of twenty years upon the same trusts. The twenty-one years allowed by the rule after lives in being were admitted for the purposes of gestation and infancy, and were never allowed as an absolute term. Here the twenty years are taken as an independent term, merely because that term falls within the words of the rule, altogether disregarding the principles upon which it was founded. After every rule has been separately resorted to, and the time allowed by it exhausted, then comes a trust for the very persons who would be entitled to the freehold and inheritance under the previous trusts, if regular trusts had been declared for life and in tail, according to the usual form of settlements. All this machinery is a vain attempt at a perpetuity, and the consequences are obviously mischievous. Sir Joseph Jekyll, in the case of *Stanley v. Leigh*, defines a perpetuity ; and Chief Baron Gilbert, in his Treatise on Uses, tells us what tends to it. "All limitations," he says, "that tend to the provision of a family, and to secure against contingencies that are within the parties' own immediate prospect, are to be favoured ; but all limitations that perpetuate, or tend to a perpetuity, are in themselves void, and repugnant to the policy of the law (*d*).'" When Lord Nottingham was asked, in *The Duke of Norfolk's Case*, where he would stop, he answered, "I will stop everywhere, when any inconvenience appears, nowhere before ; for whensoever the bounds of reason or convenience are exceeded, the law will quickly be known." Now the time to stop has arrived ; the bounds of reason are exceeded, and the inconvenience is manifest. The conclusion to which it is desired to bring your Lordships is, that the trusts declared of the personal estate and effects of the testator should be declared void, and the residue of such personal estate divided among the parties entitled to distributive shares thereof, as if the testator had died intestate.

In former cases the question has been, who, at a limited period

(*d*) Gilb. on Uses, 359.

after the testator's death, was to take the estate? And in the meantime either a different set of persons or the heir-at-law was to take it; but here the testator meant, that from his death there shall be taken devises under his will during the existence of the fictitious terms of 120 years and twenty years. The persons are to take not for accumulation, not for anything collateral to the testator's general object, but as devisees; and, after the expiration of 120 and twenty years, a new taker is not to be sought for, but the person then to take is precisely the same person who has taken, and then is in possession under the previous limitations. Terms of years are introduced into marriage settlements and wills, for the purpose of raising portions, charges or other sums of money, in order to provide for the necessities of families. These terms are not introduced into this will for any such purpose, and the legal estate for these terms is not conferred on trustees, distinct from the holders of the inheritance, in order that they may raise a sum of money for the necessities of a family. The whole legal fee simple is vested in the trustees, and they are merely directed to stand possessed of a portion of the inheritance for the terms of 120 and twenty years. But they have no duty to perform, and the only purpose for which these terms are created is to evade the law. The law says, that a succession of life estates cannot be given to unborn issue; and yet, if the limitations of this will are to be supported, there is a contrivance by which any testator may evade the law. The trusts of a term can be no otherwise limited in equity, than the estate may be limited at law. It is quite clear that the testator could not have attempted to carry his two objects into effect without the machinery of the term of 120 years, determinable on the twenty-eight lives, and of the term of twenty years. Now if this machinery can be displaced, if part only be taken away, the whole fabric must fall. If we take away this absolute term of twenty years, the whole machinery must give way.

We shall, therefore, first apply ourselves to this objection, that the testator has taken an absolute term of twenty years after lives in being, which is not allowed by the law. Every executory devise being, as far as it goes, a perpetuity, and being of late origin, introduced, or rather allowed, for the purpose of indulging testators in the distribution of their property, but within certain limits, it is incumbent on a party whose title depends on it, to show that it does

not exceed the limit allowed. It will be for the other side to do this. What it is proposed now to do is, to state to your Lordships the several leading cases on the subject of executory devises, and the *dicta* of the several Judges; and to show your Lordships, that in no one of these cases has an absolute term of twenty years been allowed. If there be no case in which an absolute term has been allowed, then, with submission to your Lordships, we contend, that the appellant's case is proved, and that the testator has exceeded the bounds allowed by law.

The earliest case which can be usefully cited, relating to executory devises, is the case of *Matthew Manning* (*e*). Lord Coke alludes to a few earlier cases in the Year Books, and some of them before the Statute of Wills, relating to lands which might be devised by custom, but they were all executory devises, after a life in being. The case of *Manning* was an executory bequest of a term after a life in being, and Lord Coke justified and supported it on the ground that an executory devise after a life in being was good, the utmost limit then allowed being a life in being. There is an earlier case of *Hinde v. Lyon* (*f*), which ought perhaps to be noticed, but is an executory devise after one life only. *Lampet's Case* (*g*) may also be mentioned as confirming, but only as confirming, *Manning's Case*. The case of *Child v. Bailie* (*h*), which was decided immediately after Lord Coke's time, is an authority the other way, and, although the Judges endeavoured to distinguish it from *Manning's* and *Lampet's Cases*, it is clear that the cases were not distinguishable. It was affirmed in the Exchequer Chamber by six of the Judges (*i*), and they said they would not question *Manning's* and *Lampet's Cases*, but that they would not extend the doctrine, and would not apply the doctrine therein laid down, except in cases exactly similar. The next case is that of *Pells v. Brown* (*k*), called by Lord Kenyon the *Magna Charta* of this branch of the law, but all that was decided there was the legality of an executory devise on a contingency not exceeding a life in being, and even this case was doubted by Chief Baron Montague, in *The Duke of Norfolk's Case*, to which we shall advert immediately. The next case is *Sanders v. Cornish* (*l*); it was a

(*e*) 8 Co. 94.

(*f*) 2 Leonard, 11.

(*g*) 10 Co. 46.

(*h*) Cro. Jac. 450.

(*i*) Sir W. Jones, 15.

(*k*) Cro. Jac. 590.

(*l*) Cro. Car. 230.

case of a term of years, and we refer to it to show that the Judges there endeavoured to revive the old doctrine, that a possibility could not be limited after a possibility. The next case is that of *Pearse v. Reeve* (*m*), in which the Judges also stated their determination not to go further than *Manning's Case*. The case of *Goring v. Bickerstaffe* (*n*) is the next case, and the first case wherein the opinion of the Judges was called for respecting several lives, all in existence at the same time; and the case that comes next is that of *Snowe v. Cuttler* (*o*); there the Court seems rather to have retrograded, and again confined the rule to one life, for in that case they would not allow fourteen years after a life in being, even in reference to minority. However, in *Love v. Windham* (*p*), which is the next case, the Judges again allowed of several lives. In the same year the case of *Wood v. Saunders* (*q*) was decided, the case so much relied on in *The Duke of Norfolk's Case*, by Chief Baron Montague. The important case of *Taylor v. Biddal* (*r*) is the next in point of date, and it is the first authority that an executory devise might be limited after a life in being, and twenty-one years, in reference to minority.

The Duke of Norfolk's Case, called *The case of perpetuity*, is the next (*s*). The Lord Chancellor Nottingham was assisted by the two Chief Justices and Chief Baron, who were against the executory devise; the Lord Chancellor was in favour of it; and Lord Chief Justice North, who decided *Taylor v. Biddal*, was one of the three chiefs. This case was reversed after Lord Nottingham's death by Lord North, then Lord Keeper, but was afterwards affirmed by the House of Lords, reversing Lord Keeper North's decree. The next in order is that of *Massenburgh v. Ash* (*t*); and the next case in point of date is that of *Lloyd v. Carew* (*u*). Upon what ground was that case decided? On the ground of twenty-one years being allowed? No; but on the ground that a reasonable time was necessary to be allowed to perform the condition, which could not have been executed in the life of the donor. The bill was in the first instance dismissed, but that decision was reversed in the House of Lords. After the case of *Luddington v. Kime* (*x*), next in date,

(*m*) Pollexf. 29.

(*n*) Ibid. 31.

(*o*) 1 Lev. 135.

(*p*) 2 Keble, 657; 1 Mod. 50.

(*q*) Pollexf. 35; 2 Swanst. 467.

(*r*) 2 Mod. 289.

(*s*) 3 Ch. Cas. 1; 2 Freem. 72; Pollexf. 223.

(*t*) 1 Vern. 234, 304.

(*u*) Prec. Ch. 72, and Shower's Cases in Parl. 137.

(*x*) Ld. Raym. 203—207.

came a very important case, which clearly shows that the utmost then allowed was a life or lives in being. That was the case of *Scatterwood v. Edge* (y). The Court held that twenty or thirty years was the probable result of taking lives in being; and in the general use made of taking lives in a family settlement, limiting one remainder after another, that might be a fair calculation; but when you come to talk of twenty-eight lives, the calculation must be not twenty or thirty years, but fifty or seventy years, thereby substituting years for lives.

The cases that come next are *Marks v. Marks* (z), and *Gore v. Gore* (a), and *Maddox v. Staines* (b), and *Stephens v. Stephens* (c), which last was decided by Lord Hardwicke, as Chief Justice, and Lord Talbot, as Lord Chancellor; and which Lord Talbot hoped would be a leading case in the decision of all questions of this kind. *Gurnall v. Wood* (d) is the next case, and in that it is quite clear what Lord Chief Justice Willes meant, taking the whole of his judgment together; for when the cases alluded to by him are *Stephens v. Stephens* and *Taylor v. Biddal*, and we have the authority of Lord Hardwicke that, before *Stephens v. Stephens*, *Taylor v. Biddal* was the only case, it is clear he must have intended the twenty-one years in reference to minority: and he says executory devises are in wills what contingent remainders are in settlements; and, by what he says in another part of his judgment, he means that in respect of a contingent remainder, when the contingency happens, it vests in the remainderman, but he cannot alienate until he attains twenty-one. But in respect of executory devises, which were taken from contingent remainders, the vesting, as well as the power of alienation, may be suspended until the devisee attains twenty-one. From the case of *Sheffield v. Lord Orrery* (e), another case decided by Lord Hardwicke as Lord Chancellor, it appears that Lord Hardwicke thought that the twenty-one years must be in reference to minority, which was the exact point which he decided in *Stephens v. Stephens*. In the same year (f) the case of *Gulliver v. Wickett* was decided in the King's Bench (g). The limitation there, no doubt, was a contingent remainder, and in reference to the devise, and taking the whole of

(y) 1 Salk. 229.
 (z) 10 Mod. 419.
 (a) 2 P. Wms. 28, 63.
 (b) Ibid. 422.
 (c) Ca. t. Talb. 228.

(d) Willes, 213.
 (e) 3 Atk. 282.
 (f) 1745.
 (g) 1 Wilson, 105.

what is said by the Chief Justice, it must be intended that speaking of twenty-one years he referred such time to minority; but at all events the most that can be said is, that this case left the question the same as it was before. Then came the case of *Bullock v. Stones* (*h*), a very important case, as it shows that Lord Hardwicke retained the same opinion which he entertained in the preceding cases. *Goodman v. Goodright* (*i*) is the next case in the Court of King's Bench: it is unnecessary to state the facts, but merely to refer your Lordships to what Lord Mansfield said. In Michaelmas Term in the same year was decided the important case of *The Duke of Marlborough v. Godolphin* (*k*), by which it appears that Lord Northington entertained the same opinion as Lord Talbot and Lord Hardwicke did, that a term of twenty-one years was not a term in gross. That case came before this House, and the same doctrine is laid down in the printed case for the respondent, signed by Mr. York and other eminent counsel, and is not contradicted by the reasons on the other side (*l*). The next case that occurred, after that of *Doe v. Fonnereau* (*m*), is the case of *Heath v. Heath* (*n*), decided by Lord Thurlow. Is not that an actual case of minority? Is it anything more than what might be effected by legal limitations? A limitation to Edward Heath for life, with remainder to his son in tail, with remainder to William Heath in fee. It is in effect that it is a devise to Edward Heath in fee, but if he should die without leaving a son at his death, capable of alienating, it should then go over. Our proposition is, that the term is not an absolute term of twenty-one years; that it has in all cases reference to infancy, and all that that case decides is, that it is not necessary that the infancy or minority should be that of the party to take, or the party from whom it is taken. The case of *Jee v. Audley* (*o*), decided by Lord Kenyon, as Master of the Rolls, must have been erroneously decided, if this term of twenty-one years be an absolute term; and so must have been the case of *Routledge v. Dorril* (*p*), before Lord Alvanley, as Master of the Rolls; because, if there may be an absolute term of twenty-one years, the testator's daughter might have appointed to issue born within the twenty-one years after her death, but it was

(*h*) 2 Ves. 521.(*i*) 2 Burr. 873.(*k*) 1 Eden's Rep. 404, 418.(*l*) 3 Bro. P. C. 245.(*m*) Douglas, 487, 509.(*n*) 1 Bro. Ch. Ca. 147.(*o*) 1 Cox, 324.(*p*) 2 Ves. jun. 357.

decided otherwise. The next case of *Long v. Blackall* (q) is most important, as it contains the opinion of Lord Kenyon, distinctly laid down, as to the length to which executory devises can extend. That case is also important, as being the first that allowed the time for periods of gestation at both ends of the term. Two years afterwards the case of *Thellusson v. Woodford* (r) came on to be heard before Lord Loughborough, in the Court of Chancery, assisted by the Master of the Rolls (Lord Alvanley), and Justices Lawrence and Buller. In that case the exact question did not arise, for there was no term of twenty-one years; it was merely a case of lives in being. But Lord Alvanley being afraid, from what Mr. Justice Buller had said, that it might be inferred that the twenty-one years might be an absolute term, without reference to minority, in giving judgment expressed himself decidedly to the contrary (s). When that case came afterwards before this House the Judges attended, and Lord Chief Baron Macdonald delivered their opinion; and in expressing that opinion, and referring to Lord Nottingham's judgment in *The Duke of Norfolk's Case*, he says, "With an easy interpretation we find from Lord Nottingham what that tendency to a perpetuity is, which the policy of the law has considered as a public inconvenience, namely, where an executory devise would have the effect of making lands unalienable beyond the time at which one in remainder would attain his age of twenty-one years, if he were not born when the limitations were executed" (11 Ves. 135). And again, he says (p. 143), "The established length of time during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of such posthumous child." And Lord Eldon, in the same case (p. 146), expresses himself to the like effect, all strongly implying, that if there be a term added after lives in being it must be with reference to minority.

But your Lordships may see the opinion of Lord Eldon more clearly expressed in the case of *Griffiths v. Vere* (t), that opinion most clearly implies that the term of twenty-one years is not an absolute term, but qualified and referable to infancy. In the case of *Crooke v. De Vandes* (u), also before Lord Eldon, it was decided that a limitation to take effect at the expiration of thirty years from the

(q) 7 Term. Rep. 100.

(r) 4 Ves. 319.

(s) See 4 Ves. 319, 326, 337.

(t) 9 Ves. 131; and see post.

(u) Ibid. 197.

testator's decease was too remote; and in the case of *Lade v. Holford* (x), the suspense of property for thirty-six years was held too remote; and in *Proctor v. The Bishop of Bath and Wells* (y), the possible suspense of property for twenty-four years was held too remote.

Let us next proceed to the important case of *Beard v. Westcott* (z). That case came on before Sir W. Grant, Master of the Rolls, he sent it to the Judges of the Court of Common Pleas, who returned a certificate in 1810. The effect of that certificate, if not overruled, was to allow an absolute term of twenty-one years. Sir W. Grant was not satisfied with that certificate, and entertaining the same opinion as his predecessor, Lord Alvanley, as to the absolute term of twenty-one years, he sent the case back to the Court of Common Pleas, particularly putting the question to the Judges. They returned a certificate (a) in 1813, confirming their former determination, and thereby establishing the validity of an absolute term of twenty-one years. Between these two certificates, the point was most ably discussed by a very learned and able writer, who was against the validity of the absolute term of twenty-one years. The case came on afterwards before Lord Eldon, Chancellor, who, not being satisfied with the certificates, sent the case to the Judges of the Court of King's Bench for their opinion. The Judges of the Court of King's Bench differed from the Judges of the Court of Common Pleas, and returned a certificate (b), that the devises over were void, thereby confirming the opinions of Lords Talbot, Hardwicke, Northington, Mansfield, Kenyon, and Alvanley, that the term was not an absolute term, but referred to minority. The case came on again upon that certificate (c), before Lord Eldon, and it was objected to the certificate, that it did not contain a sufficient answer to the case, and that it could not be collected from it, whether the circumstance, that the limitations were to take effect at the end of a term of twenty-one years, without reference to the infancy of the person intended to take, created such a suspense in the vesting as to render the limitations void. But Lord Eldon said, it was impossible that the Court of King's Bench should not have considered that point. The certificate afforded a substantial answer to the questions put, and the

(x) Amb. 479.
(y) 2 H. Black. 358.
(z) 5 B. & Ald. 801.

(a) 5 Taunt. 393, 406.
(b) 5 & Ald. 814.
(c) Turn. & Russ. 25.

inclination of his own opinion was, that the Court of King's Bench was right. The question, therefore, as it appears to us, is decided by all these cases. There is not a single case that can be adduced where an absolute term has been allowed after a life or lives. These decisions, and the *dicta* of all the learned Judges to whom we have referred, establish the contrary, and that the term must be referable to minority.

Now with respect to the text writers, and first in respect of Mr. Fearn, the passage in his book may probably be cited to induce your Lordships to think, that it was his opinion that an absolute term of twenty-one years was allowed (*d*). But we submit, that the whole of his reasoning on the point, and the cases which he refers to as illustrations, warrant the contrary inference, which is, that the period of twenty-one years, which he states to be the utmost limit after a life or lives in being, for deferring the vesting of the estate, has reference to infancy. The late Mr. Cruise, in the sixth volume (*e*) of his Digest, and Mr. Justice Blackstone, in the second volume (*f*) of his Commentaries, have also laid down, that the utmost length that has been allowed for the contingency of an executory devise, is that of a life or lives in being, and twenty-one years afterwards. From the reasoning of these writers, and the cases cited by them, we are entitled to conclude, that they did not mean the twenty-one years as an absolute term. Now if the term of twenty years cannot be an absolute term, if the testator has exceeded the limits allowed, by taking this term, then the whole machinery must, as we conceive, fall to the ground. In *Lade v. Holford* the whole was considered bad, and there was no modelling of it; so also, it was held in *Crooke v. De Vandes*, already cited; in *Ware v. Polhill* (*g*); in *Lord Southampton v. The Marquis of Hertford* (*h*); and in *Marshall v. Holloway* (*i*). If, then, the term of twenty years be cut off, the consequence will be, that there will be persons *in esse*, and willing to take if they could be allowed to do so by law, during the term of twenty years. But they cannot take during that term, because it is void, and yet the gift over cannot be accelerated, because the testator has said, that no person shall take the estate as purchaser until the expiration of that term, and your Lordships would not violate the

(*d*) Con. Rem. and Ex. Dev. 431.

(*e*) Page 445.

(*f*) Page 174.

(*g*) 11 Ves. 257, 283.

(*h*) 2 V. & B. 54.

(*i*) 2 Swanst. 432.

testator's intentions. There is one period of time, composed of both terms, upon which the testator says, certain trusts are to arise. That period exceeds the boundary allowed by the law, and therefore all the trusts must fail. After the cases of *Goring v. Bickerstaffe* and *Thellusson v. Woodford*, there can be no doubt that the vesting of property can be suspended for any number of lives, with this qualification annexed by Lord Chief Baron Macdonald and Lord Eldon, that they are not to exceed that number to which testimony can be applied to determine when the survivor of the lives dropped. Is that the case here? Of the twenty-eight lives twenty-one are altogether unconnected with the parties or the testator, all young and unsettled in life. These twenty-one persons may go all over the world, to the East and West Indies, to North and South America, and how could it be possible in such a case to determine when the survivor dropped. But the purposes also for which the lives are taken must be legal. In *Thellusson v. Woodford* they were taken for the purpose of accumulation, such purposes being then legal. But what are the lives here taken for? For the purpose of supporting limitations void at law. The testator is guilty of a fraud upon the rule of law by the use he has made of the twenty-eight lives; for it is a maxim of law, that that which cannot be done directly cannot be done indirectly. But it is said that the exility of the interests, viz. 120 years, determinable on lives and twenty years afterwards, out of which the trusts are to arise, privileges the trusts declared at this period of time; but in referring to perpetuity, limitations are to be considered according to their legal effect, and not by the quantity of interests out of which they are to arise; otherwise limitations held good in one case would be considered bad in another.

The term of 120 years is as vicious as the term of twenty years is illegal, and the trusts declared of both are void; and so also are the ulterior trusts;—the direction to convey the inheritance from and after the expiration of the terms. All the limitations, therefore, being void, why should the trust for accumulation be retained? The accumulation was directed for purposes not allowed by the law, then why continue the accumulation? The heir-at-law and next of kin have a right to determine it. The point which arises between them is this, the personal estate is directed to be laid out in the purchase of lands, to be settled to certain uses, which we hold to be

illegal. The purpose and object the testator had in view is not, and it cannot be accomplished. Then what superior right or equity has the heir-at-law over the next of kin to ask the Court that the property legally belonging to the next of kin, dedicated by the testator for purposes which cannot be effected should belong to him? Where, in the will, has the testator shown a preference to his heir-at-law over his next of kin? The case of *Tregonwell v. Sydenham* (*k*), is in point of principle in favour of the next of kin. It was decided there that the heir-at-law was entitled to all that was viciously given. Why? Because his right must be defeated by a valid disposition. Is not the same principle to be applied in case of personal estate and next of kin? Everything belongs to the next of kin, in like manner as to the heir-at-law, that is not taken away by valid disposition; here nothing is taken away by valid disposition. The personal estate must therefore be considered as undisposed of, and therefore belongs to the next of kin.

The further consideration of the case was then adjourned, and not resumed until the session of 1833, when Mr. *Preston* and Mr. *Wilbraham*, for the respondents, argued to the following effect, in support of the decree below:—

The most eminent conveyancers and text writers never doubted, as appeared from their drafts of settlement and published writings, that twenty-one years after a life or any number of lives in being might be taken as an absolute term. If any man studied this subject more diligently than another it was Mr. Fearne, who, on account of his profound study and knowledge of it, was more consulted than any man of his time. In his book on Executory Devises, he says, “This privilege of executory devises, which exempts them from being barred or destroyed, is the foundation of an invariable rule with respect to the contingency, upon which an estate of this sort is permitted to take effect, which is, that such contingency must happen within a short space of time, such as a life in being, and some few years after” (*l*). Having then stated some decided cases, and among them the cases of *Lloyd v. Carew*, and *Marks v. Marks*, in illustration of the rule, Mr. Fearne adds, “the limitations in the last two cited cases were confined to vest within a certain number of months after the end of a life in being. But these are not the utmost limits for

(*k*) 3 Dow, 194.

(*l*) Page 429.

executory devises, for the Courts have gone so far as to admit of executory devises, limited to vest within a compass of twenty-one years after the period of a life in being" (*m*); and again he says (p. 435), "More instances of the established limits of executory devises will be given in the sequel, &c., only I shall observe in this place, that the law appears to be now settled, that an executory devise, either of real or personal estate, which must, in the nature of the limitation, vest within twenty-one years after the period of a life in being, is good, and this appears to be the longest period yet allowed for the vesting of such estates." Mr. Butler, in his notes to these passages, examines recent decisions in support of the doctrines laid down; and it may be taken as a proof of his agreeing with Mr. Fearne, that he, after citing the words of Lord Alvanley, in *Thellusson v. Woodford*, adds, "But in the consequent case of *Beard v. Westcott* (*n*) it was held that an executory devise was good, though it was not to take effect till the end of an absolute term of twenty-one years after a life in being, at the death of the testator, without reference to the infancy of the person who was to take." In his and Mr. Hargrave's edition of Coke upon Littleton, in commenting upon *The Duke of Norfolk's Case*, he says (*o*), "The next advance in limitations of this nature was to extend them to a period within the compass of one or more life or lives in being, and twenty-one years after." That was the opinion of Mr. Butler, writing to the public; he also was much consulted in this branch of legal learning, and he had the largest collection of manuscript precedents of any man living, some of which contain limitations to the same effect. The same opinion was expressed by Mr. Sanders in his book on Uses (*p*), by Mr. Justice Blackstone (*q*), Mr. Wooddeson (*r*), and Mr. Cruise (*s*), without any restriction or qualification as to the minority of any one. All the text books have been examined, and not one passage is found in any one of them containing a contrary doctrine.

The Judges, the sages of the law, are as uniform as the text writers, in the assertion of the principles on which the decree of the Court below is founded. In the case of *Stanley v. Leigh* (*t*), Sir Joseph Jekyll enters into the doctrine of perpetuities, and what he there says

(*m*) Page 431.

(*n*) 5 Taunt. 393.

(*o*) Page 327 a, n. (2).

(*p*) Page 194, 4th ed.

(*q*) 2 Comm. 174.

(*r*) 2 Wood. 229.

(*s*) 6 Dig. 409—419, 437.

(*t*) 2 P. Wms. 687.

is a sufficient answer to more than one of the objections made to the limitations in the present case. "Let us see," he says, "what a perpetuity is. A perpetuity, as it is a legal word, or term of art, is the limiting an estate, either of inheritance or for years, in such manner as would render it unalienable longer than for a life or lives in being at the same time, and some short or reasonable time after," &c. After showing the mischiefs arising from estates remaining a long time unalienable, he goes on to repudiate the old distinction in the doctrine of perpetuities between limitations of fee simple and of terms of years, and cites with approbation what Lord Nottingham said on the same subject in *The Duke of Norfolk's Case*: "It is objected," he says, (p. 690,) "that the deviser intended a perpetuity, and such intention will make the limitations void. Supposing the deviser did intend a perpetuity, it would be very strange, if, for that reason only, the law should make those limitations void; for if they do not really tend to a perpetuity, the bounds which the law has set to devises or limitations for years are not transgressed, nor any of its rules violated; so that the intention is vain, and ought to have no operation at all." Most, if not all, of the cases cited and examined by the counsel for the appellant, support the limitations of the will in the present case; and it therefore becomes material to examine them once more, and see what was the foundation of the decisions in them. Lord Chief Justice Willes, in the case of *Goodtitle v. Wood*, says, that "of late years the doctrine of executory devises has been settled; they have been considered, not as possibilities, but as certain estates and interests, and resembled to contingent remainders in all other respects, only they have been put under restraints to prevent perpetuities; as first, it was held that the contingency must happen within a life in being, &c.; and the rule has in many instances been extended to twenty-one years after the death of a person in being, as in that case, likewise, there is no danger of a perpetuity" (u). In the case of *Blandford v. Thackerell* (x), Lord Loughborough, then Chancellor, in his judgment, says, that the wisdom of the law has fixed the time (of suspension), which is twenty-one years after lives in being; up to that time you may have as many springing uses as you please. You may give a legacy to the grandson of A. born in the life of A. It is a good description of the legatee, and he

(u) Willes, 213.

(x) 2 Ves. jun. 241.

would take within twenty-one years after the life of the person in being. The rule of law admits of fourteen years (the period of suspension in that case) after the termination of lives in being, and goes to twenty-one years. The rule continued to be so understood in Mr. Justice Buller's time; and he, in the case of *Theellusson v. Woodford* (y), says, the rule allowing any number of lives in being, a reasonable time of gestation, and twenty-one years, is now the clear law, that has been settled and followed for ages, and we cannot shake that rule without shaking the foundation of the law. The same learned Judge, in another part of his judgment in the same case, observes (z), that "the number of contingencies is not material, if they are to happen within the limits allowed by law, &c. The twenty-one years are allowed because the law considers that time reasonable." Lord Alvanley, in delivering his opinion in the same case (a), says, that "by *The Duke of Norfolk's Case* it was clearly decided that every executory devise is good that does not tend to a perpetuity; the meaning of which is, that every executory devise is good that does not tend to make an estate unalienable beyond the period allowed by law as to legal estates, which could not be protected beyond the time at which the remainderman, who was not in existence at the time of the limitation of the estate, would arrive at the age of maturity." A little further on is the passage on which so much reliance is placed on the other side. It is this: "As to the period of twenty-one years, &c. Nor, with submission to the learned Judge (Buller), who immediately preceded me, has it ever been considered as a term that may at all events be added to such executory devise or trust. I have only found this *dictum*, that estates may be unalienable for lives in being and twenty-one years, merely because a life may be an infant, or *en ventre sa mère*." Was it fair in that learned Judge to utter such a statement in the face of so many authorities to the contrary? Could he have read Mr. Butler's or Mr. Fearn's books? The reporter ought not to have taken notice of such a *dictum*.—[The Lord Chancellor: Do you think, Mr. Preston, that a reporter has a right to supply or suppress any part of a judgment?—Mr. Preston: I think a reporter has a discreet duty

(y) 4 Ves. 319.
(z) Ibid. 326.

(a) 4 Ves. 331.

to perform ; and if I were the reporter of that case I would not give that part of Lord Alvanley's opinion.]

The next case cited against us is that of *Jee v. Audley* (b), which was decided by Lord Kenyon, then Master of the Rolls, and the most profound property lawyer of his time. He and Lord Ashburton used to compare notes of cases and decisions. They were both bred in the same way, one with his father, a solicitor at Ashburton, the other also in a solicitor's office. He observes, in his judgment in that case, that "the limitations of personal estates are void, unless they necessarily vest within a life or lives in being, and twenty-one years, or nine or ten months afterwards. This has been sanctioned by the opinion of Judges of all times, from the time of *The Duke of Norfolk's Case* to the present. It is grown reverend by age, and is not to be broken in upon." Next comes the case of *Roe v. Jeffery* (c), in which Lord Kenyon, then Lord Chief Justice, in delivering the opinion of the Court of King's Bench, says, "Nothing can be clearer in point of law than that, if an estate be given to A. in fee, and, by way of executory devise, an estate be given over, which may take place within a life or lives in being, and twenty-one years, and the portion of a year afterwards, the latter is good by way of executory devise." Lord Eldon, in the case of *The Countess of Lincoln v. The Duke of Newcastle* (d), on appeal in the House of Lords, says, "If the limitation had been to such son, at the age of twenty-one, as would be entitled to the trust in possession of the real estates, as the son must attain the age of twenty-one within twenty-one years after the expiration of the life of his father, allowing the period of gestation, that limitation would be within the limits permitted to executory devise." His Lordship, giving his judgment as Lord Chancellor, in the case of *Griffiths v. Vere* (e), more than once expresses himself to the effect, that by executory devise an estate may be prevented from vesting for a life or lives in being, and twenty-one years, with an addition at the end for the period of gestation. That was the settled law before the case of *Long v. Blackall*, in which it was settled, that a period for gestation might be allowed both at the beginning and end of the term. In no case has Lord Eldon, or any other Judge

(b) 1 Cox, 324.

(c) 7 Term Rep. 589.

(d) 12 Ves. 232.

(e) 9 Ves. 132, 134.

except Lord Alvanley, said that the term was to be taken with reference to infancy. The next case of authority was that of *Beard v. Westcott* (*f*). The marginal note to the report of that case may mislead, and therefore the case itself, and the certificates from the Courts of Common Pleas and King's Bench, must be looked to. The Judges of the Court of Common Pleas, who certified in the first argument, were Sir James Mansfield, Mr. Justice Lawrence (both complete on this subject), Mr. Justice Heath, who had been a conveyancing counsel, and answered numbers of cases, and Mr. Justice Chambre. Sir Vicary Gibbs, who succeeded Mr. Justice Lawrence on the bench, heard the second argument, and signed the second certificate. Lord Eldon sent the case afterwards to the Court of King's Bench, and the certificate of the Judges there is reconcilable with those sent by the Court of Common Pleas, and with all the authorities, and with the principle for which we contend in this case. The unprepared expression of Lord Alvanley has not availed to discourage conveyancers from inserting in devises a term of twenty-one years, without reference to infancy. Upon the authority of the cases already cited, and of several others equally applicable, it is submitted that no estate or interest given by this will is open to the objection of transgressing the rules of law against perpetuities. The period of accumulation is restricted to a term of twenty-one years from the testator's death, and an accumulation during that period is warranted by the rules of law, and is consistent with the provisions of the statute (*g*). Every contingent or future interest given is so limited that it must vest, or fail of effect, within twenty years from the death of the survivor of the lives in being at the date of the will. The rule of law against perpetuities allows, as has been shown, of a suspense of the time of vesting for a life or lives in being, and a further period of twenty-one years, and in some cases for a period and even two periods of gestation in addition. As the rule of law is not transgressed, but its limits are observed by the testator, no argument of fraud on the rule, or of inconvenience from the application of the rule, is entitled to any weight in a court of justice. It is the province of the legislature, and not of this House, sitting as a court of justice, to reform the law if it admits of an inconvenience. If your Lordships were to legislate anew on this subject, no man could frame a new rule to be substituted

(*f*) 5 Taunt. 394; and 5 B. & Ald. 801. (*g*) 39 & 40 G. 3, c. 60.

for the one which is established by the wisdom of ages, which is a fair deduction from reason and authority, and productive of no mischief whatsoever.

The rules of law relating to property are simple, and may be easily learned, if they be adhered to and not altered; it is when they are not adhered to that the difficulty in learning them arises. The argument against this will is, that it is a fraud on the rules of law; the same arguments were used against Mr. Thellusson's will. An act of parliament was passed to restrain accumulation to twenty-one years. The period for accumulation in that act is adopted in this will. The limitations after that period for a number of lives in being, and twenty years afterwards, is no fraud on the law, because the law allows even twenty-one years. There can be no objection to the number of lives; and if the limitations were confined to them there would be no question of their validity. The objection to Thellusson's will was not the number of lives, which were nine, but to the accumulation; so the objection here is not to the number of lives but to the additional term of years. A testator may multiply lives as he pleases, may take all the lives of this house, and secure the certainty of a longer period for the suspension of the estate than the addition of twenty years to twenty-eight lives. While *Heath v. Heath*, and other cases already commented on, remain in the books unimpeached: it is absurd to say that the term must have reference to the minority of the person who is to succeed to the estate, or of any other person.

(Besides the cases mentioned, the learned counsel cited and commented on those of *Somerville v. Lethbridge*, *King v. Cotton*, *Wilkinson v. South*, *Mussenburgh v. Ashe*, *Kirby v. Fowler*, *Sheffield v. Lord Orrery*, *Gulliver v. Wickett*, *Goodtitle v. Wood*, and *Long v. Blackall*, all which were before referred to by the appellant's counsel.)

Sir *Edward Sugden*, in reply:—My learned friends have not removed my objection to this will, which is, that it is a fraud on the rules of law. The object of the testator was to provide life estates for every member of his family; but he desired to attain that object by cutting down other estates, and substituting one which is unknown to the law of England. The interests first given are all chattel interests, depending upon the lives of twenty-eight persons, who may be scattered all over the world, so that the person who may take a

vested interest in the freehold cannot know when his estate arises. If any of your Lordships were to make his will, he would begin with a limitation for life, with which this testator ended. My friends are not correct in saying that Mr. Butler considered this question, as to the term in gross concluded. Your Lordships, on looking into Mr. Butler's last edition of Mr. Fearne's book, will find several notes on what fell from Lord Alvanley in the case of *Thellusson v. Woodford*, which show that Mr. Butler considered that point still open. The law raises no objection to estates granted in perpetuity, provided there be a power to bar or destroy them, so as to render them alienable, and of that nature were the leases and conveyances referred to by my learned friend. The authority of the late Mr. Cruise was cited in support of the validity of these limitations. I deny that this text can be so interpreted; but although I esteem his book, I must say that he never lays down a proposition in such a way as justifies any one to rely on it. I do not find fault with Mr. Justice Blackstone, who merely lays down a general rule, without adding whether the term of twenty-one years is to be taken in gross, or with reference to minority. What Mr. Wooddeson says of the term of twenty-one years is equally vague and undefined. I have a better right to conclude from the text, that both these commentators contemplated the case with reference to minority, than my friends have to draw the contrary influence: for whenever you mention a life or lives, and twenty-one years, you speak of the years with reference to minority, and it is not only twenty-one years you mean, but twenty-one years and some uncertain number of months in addition, both for infancy and gestation. My friends have said that in the case of *Long v. Blackall* (h), Lord Kenyon, and Lord Eldon afterwards, in *Beard v. Westcott*, expressed themselves to the effect that the term may be taken absolutely. I cannot find any such opinions. The latter case, after it was argued in the King's Bench, came before Lord Eldon, Chancellor, on further directions, upon the certificate of that Court, and what Lord Eldon there says, as stated in the report (i), is clearly in favour of my proposition. Lord Kenyon and Lord Mansfield are also with me, and so is Lord Alvanley. My friend says, that if he were the reporter, he would not report the *dictum* of Lord Alvanley. Then it is well for the laws of England, in more senses than one, that

(h) 7 Term Rep. 100.

(i) 1 Turn. & Russ. 25.

my friend was employed otherwise than in reporting. Is a reporter to set down his own reasons instead of those of the Judge, and set himself above all the Judges? Lord Alvanley, apprehensive that what Mr. Justice Buller said, in giving his judgment in *Thellusson v. Woodford*, might be understood as having the deliberate concurrence of the Court, set himself right as to the rule of law, by saying, "As to the period of twenty-one years, it has never been considered as a term that may, at all events, be added to an executory devise or trust. I have only found this *dictum*, that estates may be unalienable for lives in being and twenty-one years, merely because a life may be an infant's, or *en ventre sa mère* (*k*). That is the doctrine that is laid down in *Routledge v. Dorril* (*l*), the judgment in which was long delayed, and carefully considered. Lord Alvanley's opinion is entitled to the greatest respect and attention. My friends say that the rule, according to their interpretation, has been established since *The Duke of Norfolk's Case*. But there was no suspense there, except during a life in being; there was no term for years added.

Sir Edward Sugden again stated some of the cases already referred to, and more particularly those of *Lloyd v. Carew*, *Marks v. Marks*, *Massenburgh v. Ashe*, *Gore v. Gore*, *Heath v. Heath*, and *Stanley v. Leigh*; no one of which, he insisted, was against the rule, as he understood it; some were within it: some did not try it at all; and from others of them no notion could be inferred that any number of years could be added; but the addition of some months only, for the period of gestation, was formerly considered by some Judges too much after the death of the parent. No case carried the indulgence farther than that of *Lloyd v. Carew*, and any attempt to extend it ought to be resisted. A period of not less than ninety years, on the most moderate calculation, must elapse after the death of the testator, before any estate can vest. Did any one ever think of such a suspension; whereas, formerly, a few months were considered too long? The suspension of these estates for so long a period is against the policy of the law, and the power given here to convert a chattel interest into an estate for life shows clearly that this was an attempt to evade the rules of law, an attempt which ought not to be favoured. Then, upon the assumption that this term of twenty years is against the law, the question arises, whether all the limitations are not void. I think

(*k*) 4 Ves. 337.

(*l*) 2 Ves. jun. 357.

they are; for part of them cannot be held good if part be bad. The rule laid down is this, where some of the limitations go beyond the period allowed by law, the whole are void: *Proctor v. The Bishop of Bath and Wells* (n), *Leake v. Robinson* (n). You cannot remodel this estate. There was never such an attempt to establish a perpetuity; and I call on your Lordships, in the words of Lord Nottingham, to stop when so manifest an inconvenience arises.

THE LORD CHANCELLOR, after suggesting that he should be glad of the assistance of the counsel in framing questions for the learned Judges, in order to dispose effectually of this question, moved to postpone the further consideration of the case, which was agreed to.

The learned Judges who attended were Justices A. Parke, Little-dale, Gaselee, Bosanquet, Alderson, J. Parke and Taunton; Barons Bayley, Vaughan, Bolland and Gurney; and the following were the questions submitted to them;—

First. Whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of twenty-one years afterwards, as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person.

Secondly. Whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the ordinary period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mère*.

Thirdly. Whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the longest period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mère*.

(m) 2 H. Black. 358.

(n) 2 Mer. 363.

The learned Judges attended again on a subsequent day, and Mr. Baron *Bayley* delivered their opinion as follows; first, in answer to the first question:—I am to return to your Lordships the unanimous opinion of the Judges who have heard the argument at your Lordships' bar, that such a limitation is not too remote, or otherwise void. Upon the introduction of executory devises, and the indulgence thereby allowed to testators, care was taken that the property which was the subject of them should not be tied up beyond a reasonable time, and that too great a restraint upon alienation should not be permitted. The cases of *Lloyd v. Carver* (o), in the year 1696, and *Marks v. Marks* (p), in the year 1719, established the point, that for certain purposes, such time as, with reference to those purposes, might be deemed reasonable, beyond a life or lives in being, might be allowed. The purpose in each of those cases, was to give a third person an option, after the death of a particular tenant, to purchase the estate; and twelve months in the first case, and three months in the other, were held a reasonable time for that purpose. These cases, however, do not go the length for which they were pressed at your Lordships' bar; they do not necessarily warrant an inference that a term of twenty-one years, for which no special or reasonable purpose is assigned, would also be allowed; and I do not state them as the foundation upon which our opinion mainly depends. They are only important as establishing that a life or lives in being, is not the limitation; that there are cases in which it may be exceeded. *Taylor v. Biddal* (q), 1677, is the first instance we have met with in the books, in which so great an excess as twenty-one years after a life or lives in being was allowed, and that was a case of infancy. It was a limitation to the heirs of the body of Robert Warton, and their heirs, as they should attain the respective ages of twenty-one, there might be an interval, therefore, of twenty-one years between the death of Robert, till which time no one could be heir of his body, and the period when such heir should attain twenty-one, till which time the estate was not to vest; and that limitation was held good by way of executory devise. That, however, was a case of infancy, and it was on account of that infancy, that the vesting was postponed. This case was followed by, and was the foundation of, the

(o) 1 Show. Parl. Cas. 137.
(p) 10 Mod. 419.

(q) 2 Mod. 289.

decision in *Stephens v. Stephens* (r). That was a case of infancy also. The executory devise there was, "to such other son of the body of my daughter, Mary Stephens, by my son-in-law, Thomas Stephens, as shall happen to attain the age of twenty-one years, his heirs and assigns for ever;" and the Judges of the Court of King's Bench certified that the devise was good. The certificate in that case is peculiar; it refers to *Taylor v. Biddal*, and says, "that however unwilling they might be to extend the rules laid down for executory devises, beyond the rules generally laid down by their predecessors, yet, upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years; and considering that the power of alienation would not be restrained longer than the law would restrain it, viz. during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity; and considering that such construction would make the testator's whole disposition take effect, which otherwise would be defeated; they were of opinion, that that devise was good by way of executory devise." This also was a case of infancy; it was on account of that infancy that the vesting of the estate was postponed; and though, under that limitation, the vesting of the estate might be delayed for twenty-one years after the deaths of Thomas and Mary Stephens, it did not follow of necessity that it would; and it might vest at a much earlier period. These decisions, therefore, do not distinctly or necessarily establish the position, that a term in gross for twenty-one years, without any reference to infancy, after a life or lives *in esse*, will be good by way of executory devise; but there is nothing in them necessarily to confine it to cases of infancy; the contemporaneous understanding might have been, that it extended generally to any term of twenty-one years; and there are some authorities which lead to a belief that such was the case. In *Goodtitle v. Wood* (s), Lord Chief Justice Willes discusses shortly the doctrine of executory devises, and notices their progress of late years. He says, "The doctrine of executory devises has been settled; they have not been considered as bare possibilities, but as certain interests and estates, and have been resembled to contingent remainders in all other respects, only they have been put under some restraints to prevent perpetuities. At first it was held that the contingency must happen within the compass of

(r) Cas. t. Talb. 232.

(s) Willes, 213; S. C., 7 Term Rep. 103, n.

a life or lives in being or a reasonable number of years ; at length it was extended a little further, viz. to a child *en ventre sa mère* at the time of the father's death ; because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience ; and the rule has, in many instances, been extended to twenty-one years after the death of a person in being ; as in that case, likewise, there is no danger of a perpetuity." And in citing this passage in *Thellusson v. Woodford* (t), Lord Chief Baron Macdonald prefaces it by this eulogium : "The result of all the cases is thus summed up by Lord Chief Justice Willes with his usual accuracy and perspicuity." He does indeed afterwards say (u), after noticing *Long v. Blackall* (x), "the established length of time, during which the vesting may be suspended, is during a life or lives in being, the period of gestation and the infancy of the posthumous child," and that rather implies that he thought the rule was confined to cases of minority. This opinion of Willes, C. J., though not published till 1797, was delivered in 1740 ; and in the minds of those who heard it, or of any who had the opportunity of seeing it, might raise a belief that there were instances in which a period of twenty-one years after the death of a person *in esse* without reference to any minority had been allowed ; and though there be no such case reported, it does not follow that none such was decided. In *Goodman v. Goodright* (y) is this passage : "Lord C. J. Mansfield says, it is a future devise to take place after an indefinite failure of issue of the body of a former devisee, which far exceeds the allowed compass of a life or lives in being and twenty-one years after, which is the line now drawn, and very sensibly and rightly drawn." This was published in 1766 ; and whether the last approving paragraph was the language of Lord Chief Justice Mansfield or the reporter, it was calculated to draw out some contradiction or explanation, if that were not generally understood by the profession as the correct limitation. In *Buckworth v. Thirkell* (z) Lord Mansfield says, "I remember the introduction of the rule which prescribes the time in which executory devises must take effect, to be a life or lives in being and twenty-one years after-

(t) 1 N. R. 388.

(u) 1 N. R. 393.

(x) 7 Term Rep. 100.

(y) 2 Burr. 879.

(z) 3 Bos. & Pul. 654, n.; S. C., 10 B. Moore, 238, n.

wards.” In *Jee v. Audley* (a) Lord Kenyon (Master of the Rolls) says, “The limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being and twenty-one years, or nine or ten months afterwards. This has been sanctioned by the opinion of Judges of all times, from *The Duke of Norfolk’s Case* (b) to the present time; it is grown reverend by age, and is not now to be broken in upon.” In *Long v. Blackall* (c) the same learned Judge says, “The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations; and the Courts have said that the estates shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common-law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail; and, until the person to whom the last remainder is limited is of age, the estate is unalienable. In conformity to that rule the Courts have said, so far we will allow executory devises to be good.” And, after referring to *The Duke of Norfolk’s Case*, he concludes, “It is an established rule that an executory devise is good, if it must necessarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of gestation.” In *Wilkinson v. South* (d), Lord Kenyon says, “The rule respecting executory devises is extremely well settled, and a limitation by way of executory devise is good, if it may (I think it should be *must*) take place after a life or lives in being and within twenty-one years, and the fraction of another year afterwards.” We would not wish the House to suppose that there were not expressions in other cases about the same period from which it might clearly be collected that minority was originally the foundation of the limit, and to raise some presumption that the limit of twenty-one years after a life in being was confined to cases in which there was such a minority; but the manner in which the rule was expressed in the instances to which I have referred, as well as in text writers, appears to us to justify the conclusion, that it was at length extended to the enlarged limit of a life or lives in being and twenty-one years afterwards. It is difficult to suppose that men of such discriminating minds, and so much in the habit of discrimination, should have laid down the rule as they

(a) 1 Cox, 325.

(b) 3 Ch. Cas. 1.

(c) 7 Term Rep. 102.

(d) 7 Term Rep. 558.

did, without expressing minority as a qualification of the limit,—particularly when in many of the instances they had minority before their eyes,—had it not been their clear understanding, that the rule of twenty-one years was general without the qualification of minority. Mr. Justice Blackstone, in his Commentaries (*e*), puts as the limits of executory devises that the contingencies ought to be such as may happen within a reasonable time, as within one or more lives in being or within a moderate term of years; for Courts of Justice will not indulge even wills so as to create a perpetuity. The utmost length that has been hitherto allowed for the contingency of an executory devise, of either kind, to happen in, is that of a life or lives in being, and twenty-one years afterwards; as when lands are devised to such unborn son of a *feme covert* as shall first attain twenty-one, and his heirs, the utmost length of time that can happen before the estate can vest, is the life of the mother, and the subsequent infancy of her son; and this has been decreed to be a good executory devise. Mr. Fearne, in his elaborate work upon Executory Devises, lays down the rule in the same way: “An executory devise to vest within a short time after the period of a life in being is good;” as in *Lloyd v. Carver*, which he states, and *Marks v. Marks*: and he says, “The Courts, indeed, have gone so far as to admit of executory devises limited to vest within twenty-one years after the period of a life in being;” as in *Stephens v. Stephens*, *Taylor v. Biddal*, *Sabbarton v. Sabbarton* (*f*), all of which he states, and in all of which the vesting was postponed on account of minority only; and then he draws this conclusion, “That the law appears to be now settled, that an executory devise, either of a real or personal estate, which must in the nature of the limitation vest within twenty-one years after the period of a life in being, is good; and this appears to be the longest period yet allowed for the vesting of such estates.” The instances put, all instances of minority, might certainly have suggested that it was in cases of minority only that the twenty-one years were allowed; but, by stating it generally as he did, he must have considered twenty-one years generally, independently of minority, as the rule. The same observation applies to Mr. Justice Blackstone. That such was Mr. Fearne’s understanding may be collected from many other passages in his book; but from none more distinctly than in the third division

(*e*) 2 Bl. Comm. 174, 16th ed.(*f*) Cas. t. Talb. 55, 245.

of his first chapter on executory devises (*g*), where, after having mentioned as the second sort of executory devises those where the devisor gives a future estate, to arise upon a contingency, without at present disposing of the fee; and after putting several instances, he then concludes the division thus: "And the case of a limitation to one for life, and from and after the expiration of one day (or any other supposed period, not exceeding twenty-one years, we may suppose), next ensuing his decease, then over to another, may be adduced as an instance of the call for the latter part of the extent to which I have opened the second branch of the general distribution of executory devises." And in his third chapter (*h*) he begins his eighth division, with this position: "It is the same (that is, that an executory devise is not too remote) if the dying without issue be confined to the compass of twenty-one years, after the period of a life in being." And in the eighth division of the fourth chapter (*i*) he says, "It seems now to be settled, that whatever number of limitations there may be after the first executory devise of the whole interest, any one of them that is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding limitations, which would carry the whole interest, happens to vest." The opinion of Mr. Fearne is continued in the different editions, from the period when his work was first published in 1773, down to the present time; but, upon that expression which occurs in *Thellusson v. Woodford* (*k*), showing that a doubt existed in the mind of Lord Alvanley, that doubt is introduced into a subsequent edition, for the purpose of consideration; but it does not appear to me, from anything expressed by his great and experienced editor, or in any note of his, that he thought the rule laid down by Mr. Fearne was not the right and correct rule; but instead of that, he seems to have intimated, that his opinion was in conformity with it; because he gives extracts from what Mr. Hargrave, who agrees with Mr. Fearne, has said upon the subject, as if the inclination of his opinion was that Mr. Fearne was right, and that the unqualified rule of twenty-one years was correct. At length, in *Beard v. Westcott* (*l*), the question whether an executory devise was good, though it was not to take effect till the end of an absolute

(*g*) 9th ed., 399, 401.

(*h*) Page 470.

(*i*) Page 517.

(*k*) 4 Ves. 337.

(*l*) 5 Taunt. 393.

term of twenty-one years after a life in being at the death of a testator, without reference to the infancy of the person intended to take, was distinctly and pointedly put by Sir W. Grant, the then Master of the Rolls; and the Court of Common Pleas certified that it was. The point, though necessarily involved in that will, was not prominently brought forward, either upon the will itself, or upon the first of the two cases that was stated; and lest it might have escaped the notice and consideration of the Court of Common Pleas, it was made the subject of an additional statement to that Court. The first certificate was in November, 1812; the next in November, 1813; and the Judges who signed them were Sir James Mansfield, Mr. Justice Heath, Mr. Justice Lawrence, Mr. Justice Chambre, and Mr. Justice Gibbs, men of great experience, and some of them very familiar with the law of executory devises. Those certificates stood unimpeached until 1822, when the same case was sent by Lord Eldon to the Court of King's Bench, and that Court certified that the same limitations which the Common Pleas had held valid, were void, as being too remote; but the foundation of their certificate was, that a previous limitation, clearly too remote, and which was so considered by the Court of Common Pleas, made those limitations also void, which the Common Pleas had held good. The subsequent limitations were considered as being void, not from any infirmity existing in themselves, but from the infirmity existing in the preceding limitation; and because that was a limitation too remote, the others were considered as being too remote also. Whether the Court of King's Bench gave any positive opinion on that I am unable to say. I think the Court of King's Bench would have taken much more time to consider that point than they did, and have given it greater consideration than it received, if they had intended to differ from the certificate that had been given by the Court of Common Pleas; but, when it became totally immaterial in the construction they were putting upon the will, to consider whether they were or were not prepared to differ from the Court of Common Pleas, it is not to be wondered at, that that point was not so fully considered as it might otherwise have been. Upon the direct authority, therefore, of the decision of the Court of Common Pleas, in *Beard v. Westcott*, and the *dicta* by L. C. Justice Willes, Lord Mansfield and Lord Kenyon, and the rules laid down in Blackstone and Fearn, we con-

sider ourselves warranted in saying that *the limit is a life or lives in being, and twenty-one years afterwards without reference to the infancy of any person whatever*. This will certainly render the estate unalienable for twenty-one years after lives in being, but it will preserve in safety any limitations which may have been made upon authority of the *dicta* or text writers I have mentioned; and it will not tie up the alienation an unreasonable length of time.

Upon the second and third questions proposed by your Lordships, whether a limitation by way of executory devise is void as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the ordinary or longest period of gestation, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mère*, the unanimous opinion of the Judges is, that such a limitation would be void as too remote. They consider *twenty-one years as the limit, and the period of gestation to be allowed in those cases only in which the gestation exists*.

The LORD CHANCELLOR (*Lord Brougham*).—I shall move your Lordships to concur in the opinions expressed by the learned Baron, as the unanimous resolutions of the Judges. The two last questions were put with a view to comprehend more fully the question argued at the bar, and to see the origin of the rule. That rule was originally introduced in consequence of the infancy of parties; but whatever was its beginning it is now to be taken as established by the *dicta* of the Judges from time to time. A decision of your Lordships in the last resort, assisted here by the then Chief Justice of the Common Pleas, in *Lloyd v. Carew (m)* settled the rule, for the whole question was then gone into. Some doubt has been expressed as to whether this principle was adopted as the uniform opinion of conveyancers. It is impossible to read the passages read by the learned Baron from Mr. Fearne's book without seeing that it was the settled opinion of that eminent person, that twenty-one years might be taken absolutely. The able editor of his book was of the same opinion, and Mr. Justice

(m) Show. Parl. Cas. 137.

Buller's opinion was stated by him and examined. Mr. Butler makes it a question of separate consideration, and treated the subject as Mr. Fearné had done. The opinion of Lord Mansfield was the same, and the doctrine is not weakened by what Lord Kenyon is stated to have said in *Long v. Blackall* (*n*). In the opinion of all the rule was clearly confined to twenty-one years, as the period now understood. It was, however, necessary to state the first question for the opinion of the Judges, and they have not shrunk from the consideration of it. It was also right to have put the other two questions, to which the learned Judges also applied themselves, and they have excluded the period of gestation beyond the term of twenty-one years, except where the gestation actually exists. If your Lordships be of the same opinion you will affirm the judgment of the Court below and dispose of this case. The rule will then be, that a limitation will not be too remote if the vesting be suspended for twenty-one years beyond a life or lives in being, but that beyond that period it would.

The judgment of the Court below was affirmed.

Cadell v. Palmer is the leading authority on the important rule against Perpetuities, because in that case its limits (not before in all respects precisely laid down) may be considered as having been finally ascertained and marked out, by the high authority of the House of Lords.

The term "rule against perpetuities" does not very happily describe what is meant by it; for it not only aims against persons rendering property absolutely inalienable, so that it should always remain in a certain line or family, but also against property being rendered inalienable beyond a certain period.

It is not intended in this note to trace the history of the rule, as this is done with great accuracy by Mr. Hargrave in his argument in *Thellusson v. Woodford* (4 Ves. 247; 2 Jur. Arg. 7), and by Mr. Lewis in his learned Treatise upon Perpetuities; suffice it to say that some of the earliest attempts at making land inalienable were the restraints endeavoured to be placed upon tenants in tail, to prevent them from suffering recoveries or levying fines, but without success. "And it was observed," says Coke, "that these perpetuities were born under some unfortunate constellation; for they, in so great a number of suits con-

(*n*) 7 Term Rep. 100.

cerning them in all the Courts in Westminster, never had any judgment given for them, but many judgments given against them. And from these fettered inheritances the freeholds of the subject are thereby set at liberty, according to their original freedom." 10 Rep. 320.

Thus it has been decided, that the power of a tenant in tail to suffer a recovery or to alien could not be restrained by any condition (*Sonday's Case*, 9 Rep. 128; Co. Litt. 233 b, 234 a), proviso (*Corbet's Case*, 1 Rep. 83; *Mildmay's Case*, 6 Rep. 40; *Pierce v. Win*, 1 Vent. 321; *Mary Portington's Case*, 10 Rep. 35), limitation (*Foy v. Hynde*, Cro. Jac. 696), custom (*Taylor v. Shaw*, Carter, 6, 22), recognizance, statute (*Poole's Case*, cited Moore, 810), or covenant (*Collins v. Plummer*, 1 P. Wms. 104). And in more recent times a trust in a deed creating estates tail, to raise, after any contract for alienation, a sum of money for the persons next in the course of limitation, has been held void as tending to a perpetuity. *Mainwaring v. Baxter*, 5 Ves. 458.

The principle upon which all these cases proceed is this, that the power of alienation by the proper mode, viz. a recovery, was an inseparable incident to an estate tail, and could not therefore by any means, either direct or indirect, be barred or restrained. And now fines and recoveries are abolished any attempt to restrain a tenant in tail from disentailing his property, according to the provisions of the Fines and Recoveries Abolition Act

(3 & 4 Will. 4, c. 74), would be equally unsuccessful.

Although the efforts to render land *absolutely* inalienable were thus one by one defeated, the ingenuity of lawyers has, almost down to the present period, been taxed, by the vanity or caprice of the owners, to tie up or to render land inalienable, *for as long a period* as the law would allow—a period which, as we have before observed, has only of late been finally determined.

Another attempt at creating perpetuities by means of successive life interests was also defeated. Thus in the case of *The Duke of Marlborough v. Godolphin*, 1 Eden's Rep. 404, the testator, John Duke of Marlborough, devised his real estates to trustees, in trust for several persons for life, with remainders to their first and other sons in tail male successively; but directed his trustees upon the birth of every son of each tenant for life, to revoke the uses before limited to their respective sons in tail male, and to limit the premises to such sons for their lives, with immediate remainders to the respective sons of such sons in tail male. It was held by Lord Keeper Henley, that the clause of revocation and re-settlement, as tending to a perpetuity, and repugnant to the estate limited, was void and of no effect.

The cases, however, upon the subject of perpetuities, in later times, have arisen principally out of springing or shifting uses, and executory devises or trusts, de-

iving their origin from the Statute of Uses (27 Hen. 8, c. 10) and the Statute of Wills (32 Hen. 8, c. 5, and 34 & 35 Hen. 8, c. 5), which were not capable of being barred or destroyed by the owner of the prior estate (1 Sand. Uses, 145, 153; *Kent v. Steward*, Cro. Car. 358; *Smith v. Warren*, Cro. Eliz. 688; *Pells v. Brown*, Cro. Jac. 590; *Doe d. Cadogan v. Ewart*, 7 Ad. & Ell. 647); and consequently the property could not be aliened until the gift over took effect. Suppose, for instance, a person by will devised land to A. and his heirs, with a proviso that on the failure of the issue of B. it should go over to C. Now in the case supposed, A. could in no way bar or destroy the executory devise over to C.; and, as long therefore as any issue of B. was in existence, it followed, if the executory devise were valid, that the estate was iralienable.

To obviate the inconvenience which would arise from property being tied up for such a period, the rule against perpetuities has at length laid down as the extreme limit beyond which property cannot be rendered inalienable, viz. *a life or lives in being, and twenty-one years afterwards, without reference to the infancy of any person whatever, and that a person en ventre sa mère is, for the purposes of the rule, considered as in existence.* See *Armitage v. Coates*, 35 Beav. 1.

Thus a child *en ventre sa mère* is considered as a life in being, and with reference to the term of twenty-one years, though born after its expiration, he will be considered as

though he were in existence during the whole period of gestation.

Persons, not bearing in mind that an infant *en ventre sa mère* is to be considered as if he were in *esse*, fell into the error of supposing, that in addition to a life or lives in being, and a term of twenty-one years, a number of months equal to the ordinary or longest period of gestation might be added. The answer, however, of the Judges to the second and third questions put to them by the House of Lords in the principal case placed the question upon a true foundation, viz. that, after the life or lives *in being*, the *twenty-one years is the limit, and the period of gestation is to be allowed in those cases only in which the gestation exists.*

Although a life or lives be not taken as part of the period, the other portion, viz. the twenty-one years, cannot be exceeded. Thus in *Palmer v. Holford*, 4 Russ. 403, where a testator gave bank stock to trustees to accumulate, and to assign the accumulated fund to the children of his son Charles, who should be living *twenty-eight years from his decease*, other than an eldest or only son, as tenants in common, and if but one such child then the whole to such child, and in ease no such child or children other than and except an eldest or only child should be living at the expiration of twenty-eight years, then over, it was held by Sir J. Leach, M.R., that the bequest was void. "The expressed intention," said his Honor, "is, that all the children of Charles, other than an eldest son,

should take, who were living at the expiration of twenty-eight years, and that no person should take before that period. If Charles had such children born to him at any time within seven years from the testator's death, then the vesting of the interests of such children who were unborn at the death of the testator, *would have been suspended for more than twenty-one years, and the gift therefore is too remote and void*; and the gifts over, not being to take effect until after the same period, which is too remote, are necessarily void also." See also *Speakman v. Speakman*, 8 Hare, 180.

But although property be limited so as not to vest until after the expiration of twenty-one years, if the limitation be to *persons living at the testator's death*, it will not be void on account of remoteness. Thus in *Lachlan v. Reynolds*, 9 Hare, 796, where the testator directed that his executors, *when thirty years were expired*, should order all his property, both freehold and leasehold, to be sold, and two-thirds thereof to be divided amongst his children *living at that period*, or to their heirs, Sir George Turner, V. C., was of opinion that the word "*or*" ought to be construed as "*and*." His Honor observed, "It appears to me, that this amounts to no more than a gift to such of several persons who may be living at the death of the testator as shall be living at the end of thirty years. The legacies are vested at the termination of a life in being at the death of the testator; and they are not, therefore,

liable to any objection on the ground of remoteness."

It has also been determined that the rule is applicable to limitations of personal as well as of real estate, and is to be followed in equity as well as at law. 2 Jur. Arg. 51; *Lewis*, Perpet. 169.

Before examining the application of the rule to various classes of cases, it may be mentioned that the governing principle (which will hereafter be abundantly illustrated) is, that *possible*, and not *actual*, events are alone considered, and that consequently no limitation will be good, unless it *necessarily*, if at all, takes effect within the time allowed by the rule; nor will any gift be valid if it *possibly* may include objects too remote. *Gee v. Audley*, 1 Cox, 324; *Lord Dungannon v. Smith*, 12 C. & F. 546; *In re Sayer's Trusts*, 6 L. R., Eq. 319.

A gift, moreover, must not only vest within the time limited by the rule against perpetuities, but the interests of the respective parties in the property must be capable of ascertainment within that period, otherwise the gift will be void. *Curtis v. Lukin*, 5 Beav. 147; see also *Oddie v. Brown*, 4 De G. & J. 186; and *Wood v. Drew*, 33 Beav. 610.

The period from which the time allowed by the rule begins to run, when the limitations are created by deed, is from its date (*Lewis*, Perpet. 171); when by will, is from the death of the testator. *Tregonwell v. Sydenham*, 3 Dow, 194, 215; *Ibbetson v. Ibbetson*, 10 Sim. 515; *Vanderplank v. King*, 3 Hare, 17;

Faulkner v. Daniel, Ib. 216; *Williams v. Teale*, 6 Hare, 251; *Cattlin v. Brown*, 11 Hare, 382; *Peard v. Kekewich*, 15 Beav. 173; *Southern v. Wollaston*, 16 Beav. 166, 276; *Monypenny v. Dering*, 2 De Gex, Mac. & Gord. 145; *Dungannon v. Smith*, 12 C. & F. 546. See vide *Harris v. Davis*, 1 Coll. 416; *Andrew v. Andrew*, Ib. 690; *Rye's Settlement*, 10 Hare, 112; *Gee v. Liddell*, 35 Beav. 658; 2 L. R., Eq. 341.

It may be here mentioned, that although the English statutes relating to superstitious uses and to mortmain are not to be considered as imported into the laws of India or our colonies (see post, note to *Corbyn v. French*), the rule against perpetuities, which exists independently of statutes, and is founded on public policy, will be considered as part of such laws. *Neo v. Neo*, 6 L. R., P. C. C. 381, 394.

Rule as applicable to Limitations after a Failure of Issue or Heirs.

An executory devise, or a springing or shifting use to arise after an indefinite failure of issue will be void as against the rule.

Suppose, for instance, there be a gift to A. and his heirs, with a limitation over, on the failure of the issue of B. a stranger, to C. and his heirs; now it is evident that the issue of B. might not fail for centuries, and during that period the property would be inalienable, inasmuch as A. could not, in case it were an executory devise, or a shifting or springing use, bar or destroy the estate limited to C., it is there-

fore void as too remote. See *Badger v. Lloyd*, 1 Ld. Raym. 526; 1 Salk. 233; *Harding v. Nott*, 7 Ell. & Bl. 650.

Again, where the general failure of issue is that of a person having a prior life estate, unless it be restricted either to issue living at his death, or he takes by implication an estate tail, the gift over will be void.

Questions of considerable difficulty often arise in determining whether words importing a failure of issue mean a general failure, or a failure of issue at the death of such person. (See *Forth v. Chapman*, post, where this question is fully discussed.) If the former construction prevail, then any gift dependent upon, or to take effect after it, will (with the exceptions hereafter mentioned) be void; if the failure of issue be restricted to issue living at the death, then the gift over will be good as being clearly within the rule. See and consider now 1 Vict. c. 26, s. 29.

It has been before stated that there are some exceptions to the rule as to the effect of a limitation over after a general failure of issue; perhaps a more accurate expression would have been, that the Courts, being desirous of carrying out the intention of the testator as far as possible, and, in order to render what would be void as an executory devise over, after a general failure of issue, valid as a remainder dependent upon an estate tail, have given, when they could, to the prior devisee an estate tail by implication (upon which a valid remainder over may be limited), instead of an estate in fee determinable by an executory gift over on a

general failure of issue, which, as we have before seen, is bad. Suppose, for instance, an estate be devised to A. and his heirs, but if he die without heirs of his body, or without issue, to B., if this were construed as an estate in fee in A., with an executory devise over to B. on a general failure of issue of A., the gift over to B. would be void as too remote; but the courts, considering that it was the intention of the testator to give some benefit to the issue of A. (who would take nothing if he had the fee), hold him to be entitled by implication to an estate tail, under which, unless it be barred by him, his issue will take, while the limitation over to B. is valid as a remainder after the estate tail. See *Doe d. Ellis v. Ellis*, 9 East, 383; *Roe v. Jeffery*, 7 T. R. 589.

Upon the same principle, where land is devised to A. for life, or indefinitely, with a limitation over to B. upon A.'s dying without issue, by the operation of the rule in *Shelley's case*, A. takes an estate tail, so that the limitation over to B., which would have been void as an executory devise after a general failure of issue, will be valid as a remainder, after the estate tail of A. See *Shelley's case*, and note, post.

In deeds an estate tail will sometimes be raised by implication, but as they are construed with greater strictness than wills, the word "heirs" is essential to such construction. Thus, if in a deed there be a conveyance to A. and his heirs, with a limitation over on his dying without heirs of his body, or without issue of his body, to the use of B., in such cases A. will take by implication

an estate tail, and B. a remainder expectant thereon; whereas if A. were held to take an estate in fee, with a shifting or springing use over to B., limited after a general failure of issue, it would be void as too remote. 2 Prest. Estates, 484, 504; *Scraper v. Rhodes*, Com. 54.

A conveyance to A. simply, with a limitation over to the use of B. on the death of A. without heirs of his body, will give A. an estate tail, with a remainder over to B. Lewis, Perpet. 180.

But if in deeds the word "heirs" does not occur in the gift to the first taker, either actually or referentially, an estate tail will not be created by such words as would in the case of a will confer such an estate by implication. 2 Prest. Estates, 481.

Although there be a gift over, after a general failure of issue, if it be so limited that it must necessarily take effect during a life or lives in being, and twenty-one years after, it will be equally valid, as being within the limits of the rule, as if the failure of issue had been restricted to the death of the first taker. Thus, in *Gee v. Liddell*, 2 L. R., Eq. 341, 35 Beav. 658, where a testator devised and bequeathed real and personal property upon trust for his nephew for life, and after his death upon trust for his child or children absolutely, with a direction that if there should be no child or children or remoter issue of his said nephew, who should survive the testator and his said nephew, then over, it was held by Lord Romilly, M. R., that the gift over was not void for remoteness, inasmuch as the

word "survive" imported that the remoter issue of the nephew must be alive at the death of the testator and his nephew. *Sed vide Re Clark's Estate*, 3 De G., J. & S. 111; Lewis, Perpet. 188; *Roe v. Jeffery*, 7 T. R. 589.

Where a person is entitled to an estate in reversion expectant upon an estate tail, if he devise the estate after the failure of the issue who would take under the entail, the devise will be valid, there being no danger of a perpetuity in such a case, inasmuch as the estate tail can at any time be barred, and the estate rendered alienable. Thus in *Badger v. Lloyd*, 1 Ld. Raym. 523; 1 Salk. 232; a father being entitled under a settlement to the reversion in fee of an estate expectant, upon an estate in tail male in his son John, by his will devised the estate *from and after* his son John's death without issue male to another son. An objection was taken, that the estate devised by the will was executory and void. But it was answered, that it was not an executory but an immediate devise; and the words "from and after," were only a declaration when it should take effect in possession. . . . If John had not had any estate tail in the land, but the devise had been *after the death of a stranger without issue*, that would have been an executory devise, and void by reason of the remoteness of the possibility; but there it was limited after the determination of the particular estate. See also *Lytton v. Lytton*, 4 Bro. C. C. 441.

But where the line of issue on whose failure the reversion is de-

vised does not coincide with that upon the failure of which the reversion is expectant, the devise will be too remote, and consequently void. Thus in *Lady Lanesborough v. Fox*, Ca. t. Talb. 262, the testator, being entitled to the reversion in fee of lands settled on the marriage of his son on his son for life, with remainder to his first and other sons by M. his wife successively in tail male, and in default of such issue to the use of the heirs male of the body of the son, remainder to the right heirs of the testator, by his will devised the hereditaments comprised in the settlement, *on failure of issue of the body of his son, and for want of heirs male of his own body*, to his daughter and the heirs of her body; it was held by the House of Lords, reversing the decision of the Exchequer Chamber in Ireland, that the daughter took no estate whatsoever, and that the devise to her was absolutely void, as being upon too remote a contingency. See also *Bankes v. Holme*, 1 Russ. 394, n.; *Bristow v. Boothby*, 2 S. & S. 465.

The Court, however, is inclined in such cases to construe words used by the testator importing an indefinite failure of issue to mean a failure of the issue entitled under the entail, so as to support the devise as a mere disposition of the reversion. See *Jones v. Morgan*, 3 Bro. P. C. 323, Toml. Ed.; *Lytton v. Lytton*, 4 Bro. C. C. 441; *Sanford v. Irby*, 3 B. & Ald. 654; *Egerton v. Jones*, 3 Sim. 409; *Lewis v. Templer*, 33 Beav. 625.

Another exception it seems to the rule, by which limitations over on a

general failure of issue are too remote, is where the interest in the property limited is of such a nature that it must necessarily determine within the time allowed by the rule, viz. a life or lives in being, and twenty-one years after. Butler's note to Fearn, C. R. 500; Lewis, Perpet. 673, and cases there cited.

Again, where there is a limitation over by executory devise to take effect in default of *heirs* of a person, it will be invalid as too remote, unless by implication an estate tail can be given to the prior devisee. Thus in *Grumble v. Jones*, Willes, 166, n., where a testator devised lands to his daughter for life, remainder to A. the eldest son of his daughter, *and his heirs*, and for want of such heirs remainder to the right heirs of J. S., who was his daughter's husband, it was the clear opinion of the Court that A. took an estate in fee, and that the limitation over was void. "For the limitation was express to A. *and his heirs*, and the remainder over for want of such heirs does not necessarily show that the deviser intended that the estate should pass over for want of *heirs of his body*, for he might mean for want of *heirs in fee*; and it was but reasonable that the common and legal construction of words should be taken where it did not appear from a necessary or plain implication that the intent of the deviser was otherwise. If, therefore, a limitation in a will be to the eldest son of the deviser *and his heirs*, and for want of such heirs remainder to the second son, who if the first son die without issue is next heir both to his father and brother, in this case the limitation to the

eldest son must be understood to be an estate tail; because the word '*heirs*' cannot be taken to signify '*heirs in fee*,' when the limitation over for want of such heirs is to the next heir in fee." *S. C.*, 2 Eq. Ca. Abr. pl. 300, 15; 11 Mod. 207; Salk. 238, nom. *Aumble v. Jones*. See also *Attorney-General v. Gill*, 2 P. Wms. 369; *Griffiths v. Grieve*, 1 J. & W. 31.

And not only will an estate tail be implied when the devisee over is heir in the lineal line, but also when he is a relation however remote in the collateral line; and since 3 & 4 Will. 4, c. 106, if he be a relation in the ascending line, or by the half-blood, in fact when he is capable of inheriting from the prior devisee; because it would be absurd to suppose that the testator intended the gift over to take effect to a person upon an event which must include his own death. (See *Parker v. Thacker*, 3 Lev. 70; *Tyte v. Willis*, Ca. t. Talb. 1; *Doe d. Hatch v. Bluck*, 6 Taunt. 485; *Simpson v. Ashworth*, 6 Beav. 412.) And where there was a gift over to several, in default of heirs of the first devisee, one of whom was not, but the others were, capable of inheriting from him, it was held that he took an estate tail. *Harris v. Davis*, 1 Coll. 416.

As we have before seen, where there is a limitation over after an estate tail, inasmuch as the tenant in tail, by resorting to the usual mode of barring the entail, can defeat the limitation over, it does not come within the danger of a perpetuity, and is therefore valid, as where there was a proviso in a will

by which one estate tail was made to cease, and go over to another person upon the tenant becoming seised of other estates. "No rule of law," said Sir Lloyd Kenyon, M. R., "is contradicted by it; and if no recovery were suffered, it might take place at any distance of time. I might as well be told that an estate tail is an illegal estate, because it may endure for ever." *Nicolls v. Sheffield*, 2 Bro. C. C. 215; see also *Carr v. Earl of Erroll*, 6 East, 58; *Earl of Scarborough v. Doe d. Saville*, 3 Ad. & Ell. 897.

And the result is the same, if the limitation after an estate tail be to a trustee for a class of issue to be ascertained at the determination of the estate tail, or upon trust to convey to such class or sell and divide the produce amongst such class. *Heasman v. Pearse*, 7 L. R., Ch. App. 275; reversing *S. C.*, 11 L. R., Eq. 522. See also *Cole v. Sewell*, 4 D. & War. 1; 2 H. L. Ca. 186; *Doe d. Winter v. Perratt*, 9 C. & F. 606.

Where a term of years is limited immediately *after* an estate tail, upon a failure of the issue of the persons taking under the entail, the term will not be too remote, as it might be barred by the tenant in tail. See *Morse v. Lord Ormonde*, 5 Madd. 99; 1 Russ. 382; *Eales v. Conn*, 4 Sim. 65; *Faulkner v. Daniel*, 3 Hare, 199; *Bristow v. Boothby*, 2 S. & S. 465. But the trusts of the money to be raised by means of such term might be void for remoteness, and in such case the heir at law of the testator would take it as personalty. *Tregonwell v. Sydenham*, 3 Dow, 194; *Burley v. Evelyn*, 16 Sim. 290.

Where, moreover, the term of years is *precedent* to the estate tail, and is to arise after a general failure of issue, as it cannot be barred by the tenant in tail, it will be void, as too remote. *Case v. Drosier*, 2 Keen, 764; 5 My. & C. 246; see also *Eales v. Conn*, 4 Sim. 65; *Doe d. Lumley v. Scarborough*, 3 Ad. & Ell. 897; 4 Nev. & Man. 724; *Baker v. Tucker*, 3 H. L. Ca. 106; *Sykes v. Sykes*, 13 L. R., Eq. 56.

Rule as it affects Remainders.

Some contingent remainders were liable, previous to 8 & 9 Vict. c. 106, s. 8, to be destroyed by the forfeiture, surrender or merger of the preceding estate of freehold, and it has been considered by some, by analogy to the cases in which it has been held that a limitation to take effect on the determination of an estate tail is valid, because the estate tail can at any time be barred by the tenant in tail, that in like manner a contingent remainder, in other respects obnoxious to the rule against perpetuities, might be supported, because it was liable to be destroyed by the owner of the preceding estate of freehold. There does not, however, appear to be any authority for the doctrine, nor does the analogy appear to hold good, because a recovery, or what is substituted for it, is a legal and rightful act, and it may therefore be fairly presumed that a tenant in tail would at the earliest opportunity acquire the fee, and so obtain full dominion over the property, by which the executory limitation over is taken out of the reason of the rule against perpetuities; the destruction, how-

ever, of contingent remainders being a tortious and wrongful act, it is not to be presumed that the tenant for life would commit it, so as to take the contingent remainder out of the rule.

Thus, in the case put by an eminent writer, if freehold lands, of which the legal inheritance was in the testator, were devised to A. for life, with remainder to his eldest son who should be living at his (the son's) decease for life, with remainder in fee to the children of such eldest son who should be living at his (the son's) decease; although A. (previous to 8 & 9 Vict. c. 106) might have destroyed all the remainders, and the eldest son might have destroyed the ultimate remainder in fee devised to his children, without being amenable either in law or equity to the persons whose estates were destroyed, such ultimate remainder would nevertheless, it is conceived, be void, on the ground of remoteness (1 Jarm. Wills, 232, 3rd ed.); and as contingent remainders cannot now be destroyed (8 & 9 Vict. c. 106; 40 & 41 Vict. c. 33), it is clear that such remainder would be bad.

Considerable discussion, however, has taken place upon the question, whether the rule against perpetuities is applicable to estates which take effect by way of remainder in the same mode as in the case of limitations by way of executory devise, or shifting or springing use. The Real Property Commissioners appear to have been of the opinion that it is not applicable. See 3 Real Prop. Com. Rep. p. 29. The same view is also taken by Mr.

Williams in his able work on Real Property, and also by Lord St. Leonards in the case of *Cole v. Sewell*, 4 D. & W. 1; 2 C. & L. 344: there, by a settlement, lands were limited to trustees, to the use of the settlor for life, with remainder, subject to a term of ninety-nine years, to the use of his three daughters, for their lives, as tenants in common, with remainder to trustees, during the life of each daughter, to preserve contingent remainders, with remainder as to the share of each daughter, at her death, to the use of her first and other sons successively in tail male, with remainder in case of the death of any one or more of the daughters without issue male, to the use of the survivors or survivor during their or her respective lives and life, with remainder, in like manner, as to the original share, to the use of the first and other sons of such surviving daughters or daughter in tail male, with remainder, in case all the daughters should die without issue male, as to the share of each, to the use of the daughters as tenants in common in tail; and in case one or more of the daughters should die without issue, it was provided, that the share or shares of such daughter or daughters should go to the use of the daughters of such survivors or survivor, as tenants in common in tail general: the ultimate remainder was limited to the use of the settlor in fee. It was held by Lord St. Leonards (then Lord Chancellor of Ireland), that the limitation, in case of the failure of issue generally of any of the daughters, to the daughters of the survivors or survivor, was not

void for remoteness. "As to the question of remoteness," said his Lordship, "at this time of day, I was very much surprised to hear it pressed upon the Court, because it is now perfectly settled, that where a limitation is to take effect as a remainder, remoteness is out of the question, for the given limitation is either a *vested* remainder—and then it matters not whether it ever vest in possession, because the previous estate may subsist for centuries—or for all time—or it is a *contingent* remainder, and then, by the rule of law, unless the event upon which the contingency depends happen, so that the remainder may vest *eo instanti* the preceding limitation determines, it can never take effect at all. There was a great difficulty in the old law, because the rule as to perpetuity, which is a comparatively modern rule (I mean of recent introduction when speaking of the laws of this country), was not known, so that while contingent remainders were the only species of executory estate then known, and uses and springing and shifting limitations were not invented, the law did speak of remoteness and mere possibilities as an objection to a remainder, and endeavoured to avoid remote possibilities; but since the establishment of the rule as to perpetuities, this has long ceased, and no question now ever arises with reference to remoteness; for if a limitation is to take effect as a springing, shifting or secondary use not depending on an estate tail, and if it is so limited that it may go beyond a life or lives in being, and twenty-one years, and a few months, equal to gestation,

then it is absolutely void; but if, on the other hand, it is a remainder, it must take effect, if at all, upon the determination of the preceding estate. In the latter case, the event may or may not happen, before, or at, the instant the preceding estate is determined, and the limitation will fail or not, according to that event. It may thus be prevented from taking effect, but it can never lead to remoteness. That objection, therefore, cannot be sustained against the validity of a contingent remainder. If the remainder over had been regularly in default of issue male of the daughters, it would have taken effect, when and if that failure happened. Now the remainder over is in default of issue generally, but it can only take effect when and if there is a failure of issue male, that is, upon the regular determination of the previous estate; there is no distinction in point of perpetuity between the limitations; either can only take effect at the same period. The simple distinction is, that although the event happen, the latter gift—depending upon the contingency—may never take effect; but that introduces no question of remoteness." *Cole v. Sewell*, 2 Dru. & Warr. 28.

With regard to *Cole v. Sewell*, 4 Dru. & Warr. 1; 2 Conn. & Laws. 344, the decision in that case was affirmed in the House of Lords (2 H. L. Ca. 186); but it is clearly right, irrespective of the question as to the applicability of the rule against perpetuities to remainders, inasmuch as the remainders were limited to take place after an estate tail, which is sufficient, according to the principles before laid down,

to take them, however remote, out of the danger of a perpetuity. See also *Jack v. Fetherstone*, 2 Huds. & Br. 320.

Moreover there can be no doubt that where *legal* remainders take effect upon the determination of particular estates limited to *persons in esse*, inasmuch as they must vest, if at all, immediately upon the determination of such estates (*Perceval v. Perceval*, 9 L. R., Eq. 386), the remainders will be valid, however remote may be the contingency upon which they are to take effect, as being within the limits of the rule. See *Wrightson v. Macaulay*, 14 Mees. & W. 214; 4 Hare, 487; *Doe d. Winter v. Perratt*, 9 C. & F. 606; *Thorpe v. Thorpe*, 1 Hurlst. & C. 326; 8 Jur., N. S. 871.

The necessity, however, that a contingent remainder should take effect immediately upon the determination of the particular estate does not in *all cases* (as Lord St. Leonards appears to have assumed in *Cole v. Sewell*) render the rule against perpetuities inapplicable to the case of contingent remainders. Thus if the legal estate be in trustees (*Hopkins v. Hopkins*, Ca. t. Talb. 44; 1 Atk. 581; *Chapman v. Blissett*, Ca. t. Talb. 145; *In re Eddels' Trusts*, 11 L. R., Eq. 559), or, under the old law, where there were trustees to preserve contingent remainders (*Hopkins v. Hopkins*, 1 Atk. 588, 590), there is no rule which renders it necessary that remainders should vest immediately upon the determination of the particular estate, but they must wait until the contingency takes place upon which they are limited, the

intermediate rents falling into the residue (*Holmes v. Prescott*, 12 W. R. (V. C. W.), 636; *Countess of Bective v. Hodgson*, 1 H. & M. 376; 10 H. L. Ca. 656; *In re Eddels' Trusts*, 11 L. R., Eq. 559, overruling *Riley v. Garnett*, 3 De G. & Sm. 629). If, therefore, the contingency be beyond the limits allowed by the rule against perpetuities, they will fail. *Monypenny v. Dering*, 7 Hare, 568; 16 Mees. & W. 418; 2 De G., M. & G. 145.

Again, suppose there were a limitation by deed to A. for life, remainder to A.'s eldest son (then unborn) for life, remainder to such unborn son's first and other sons in tail; A. might have a son, and his son might have a son during the life of A., so that the ultimate remainder might be able to take effect (if there were no objection to it on the ground of remoteness) immediately upon the determination of the two prior life estates; but it cannot, therefore, for a moment be contended that the existence of the rule by which it is necessary that a remainder should take effect immediately upon the determination of the particular estates renders the rule against perpetuities unnecessary or inapplicable. See *Cooke v. Bowler*, 2 Keen, 54.

It seems indeed to be acknowledged, that the not very well defined rule, that there cannot be a possibility upon a possibility, is obsolete, and that contingent limitations are no longer kept within due limits by it; but then a new rule is laid down, apparently, it is said, derived from the old rule which prohibited double possibilities, "by

which an estate cannot be given to an unborn person, followed by any estate to any child of such unborn person" (Ib.; and see *Cole v. Sewell*, 4 Dru. & Warr. 1; *Monypenny v. Dering*, 2 De G., M. & G. 168). This minor rule seems, however, to be a mere fragment of the more comprehensive rule against perpetuities, and quite insufficient to meet all the cases in which, were the rule against perpetuities not applicable, all the inconveniences of remoteness, so much dreaded in other executory limitations, would arise.

One argument against the rule being applicable to contingent remainders is founded upon the assertion, that it was introduced merely for the purpose of preventing the evil arising from perpetuities, by restraining within due bounds executory devises, and springing and shifting limitations, which were unknown to the common law, long after contingent remainders had been introduced. This argument has been well answered by a learned author. "There is nothing," he observes, "to show that the evil had been experienced in previous times; still less, that it had been tolerated. What first exhibited the danger, became the parent of the remedy; but, why is the remedy held to be restricted to that particular case, when in subsequent times the same evil shows itself in other forms? Again, the objection is, you introduce an *ex post facto* law for remainders. It is difficult to discover in what sense this applies to remainders, which is not equally predicable of executory

interests. Were not executory interests actual facts in our legal system prior to the discovery of a rule for the prevention of immoderate remoteness? What undue stretch of authority is involved in applying to remainders a necessary rule, which by the same authority and no other, and upon considerations of necessity, was imposed upon executory interests?" Lewis, *Perpet. Supp.* 125.

A conclusive argument in favour of the applicability of the rule against perpetuities to remainders, is that the doctrine of *cy pres* was invented and is put in force in order to save remainders from the consequences of remoteness. This clearly was the opinion of the Court of Exchequer in *Monypenny v. Dering*, 16 Mees. & W. 428.

The argument, however, as to the non-application of the rule of perpetuities to remainders, arising from the destructibility of contingent remainders, should they not vest *eo instanti* upon the determination of the preceding limitation, has, at any rate, after the passing of 40 & 41 Vict. c. 33, been rendered ineffective. By that statute it has been enacted that "Every contingent remainder created by any instrument executed after the passing thereof (2nd August, 1877), or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent re-

mainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise, or other executory limitation." Sect. 1.

The devise of an estate in reversion may be, it appears, void for remoteness, when a devise of an estate in remainder would not. See *Bankes v. Holme*, 1 Russ. 394, n.

Where there is an executory bequest of personalty, by way of remainder, after a life interest, to a class, *some* of whom may not necessarily answer a particular description within the limits of the rule, the whole gift will be invalid, although at such period some of the class may answer such description. Thus in the leading case of *Leake v. Robinson*, 2 Mer. 363, a testator gave personal estate to trustees upon trust for A. for life, and after his decease, upon trust to assign and transfer the same to such child or children of A., being a son or sons, *who should attain the age or ages of twenty-five*, and to such child or children, who being a daughter or daughters, should attain such age or ages, or be married; and in case A. died without leaving issue living at the time of his decease, or, leaving such, they should all die before any of them should attain twenty-five, if sons, and if daughters, before they should attain such age or be married, then to pay, apply and transfer the same unto the brothers and sisters of A., upon their attaining twenty-

five, if a brother or brothers, and if a sister or sisters, at such age or marriage as aforesaid. Previous to the date of testator's death, A. had five brothers and sisters born, and one subsequent to that event. A. afterwards died without issue. It was argued that although the bequest was too remote as to the child born after the death of the testator, it was valid as to those born previously, or, at any rate, as to those who were in esse at the date of the will. That if it were a direct gift at law those only would take who were capable, to the exclusion of those who were not capable of doing so, and that therefore by analogy to the law, and to carry into effect the intention of the testator as far as possible, the bequest ought in equity to be valid as to those members of the class who were in esse before the death of the testator. Sir W. Grant, M.R., however, held that the bequest was altogether void. "To induce the Court," said his Honor, "to hold the bequests in this will to be partially good, the case has been argued as if they had been made to some individuals who are, and to some who are not, capable of taking. But the bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. I must make a new will for the testator, if I split into portions his general bequest to the class, and say, that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be, viz. a series of particular legacies to particular in-

dividuals, or, what he had as little in his contemplation, distinct bequests, in each instance, to two different classes, namely, to grandchildren living at his death and to grandchildren born after his death." See also *Bull v. Pritchard*, 1 Russ. 213; 5 Hare, 567; *Vawdry v. Geddes*, 1 Russ. & My. 203; *Ring v. Hardwick*, 2 Beav. 352; *Griffith v. Blunt*, 4 Beav. 248; *Southern v. Wollaston*, 16 Beav. 166; *Read v. Gooding*, 21 Beav. 478; *Scaman v. Wood*, 22 Beav. 591; *Merlin v. Blagrave*, 25 Beav. 125; *Rowland v. Tawney*, 26 Beav. 67; *Blagrove v. Hancock*, 16 Sim. 371; *Judd v. Judd*, 3 Sim. 525; *Newman v. Newman*, 10 Sim. 51; *Comport v. Austen*, 12 Sim. 218; *Boreham v. Bignall*, 8 Hare, 131; *Pickford v. Brown*, 2 K. & J. 426; *In re Edmondson's Estate*, 5 L. R., Eq. 389; *Bentinck v. Duke of Portland*, 7 Ch. D. 693; and see *Fox v. Porter*, 6 Sim. 485, where one of the class was actually named in the will; *Smith v. Smith*, 5 L. R., Ch. App. 342; *Hale v. Hale*, 3 Ch. D. 643; and the observations therein on *In re Moscley's Trusts*, 11 L. R., Eq. 499; *Stuart v. Cockerell*, 7 L. R., Eq. 363; 5 L. R., Ch. App. 713; sed vide *James v. Lord Wynford*, 1 Sm. & Giff. 58, 59.

Upon the same principle, where after the death of an unborn tenant for life there is a gift to the children and grandchildren of an unmarried man, the gift will be void for remoteness, because it postpones the ascertainment of the class to take till after the expiration of a life not in being at the death of the testator. *Stuart v. Cockerell*, 7 L.

R., Eq. 363, 867; 5 L. R., Ch. App. 713.

A gift, however, in such a case to the children of the living tenant for life, with a substitution of such of them as died before the period of distribution, would be good as to the children, but void as being too remote so far as the substitutional gifts were concerned. *Baldwin v. Rogers*, 3 De G., Mac. & G. 649; *Packer v. Scott*, 33 Beav. 511.

The rule against perpetuities is applicable where there is a gift to a class too remote, and a living person as part of the class, for where the whole of his intention, viz., distribution amongst the whole class, cannot prevail, effect will not be given to part of it, viz., the gift to the living person (*Porter v. Fox*, 6 Sim. 485); though it seems it would where the gift was to them as joint tenants. 1 Jarm. 252.

Where, however, particular sums are given to each member of a class, or the individual shares of every member of the class can be ascertained within the proper periods, the gift is valid as to those within the rule against perpetuities, though invalid as to the rest. *Storrs v. Benbow*, 2 My. & K. 46; *Catlin v. Brown*, 11 Hare, 372; *Wilkinson v. Duncan*, 30 Beav. 111; *In re Moscley's Trusts*, 11 L. R., Eq. 499; and the observations therein on *Webster v. Boddington*, 26 Beav. 128. And see and consider *Arnold v. Congreve*, 1 Russ. & My. 209; *Griffith v. Pownall*, 13 Sim. 393; *Knapping v. Tomlinson*, 10 Jur. N. S. 626; 12 W. R. 784; *Greenwood v. Roberts*, 15 Beav. 92; *Seaman v. Wood*, 22 Beav. 591; *Wilson*

v. *Wilson*, 28 L. J., Ch. 95; 4 Jur., N. S. 1076; *Salmon v. Salmon*, 29 Beav. 27; *Packer v. Scott*, 33 Beav. 511; *Wetherell v. Wetherell*, 1 De G., Jo. & Sm. 134; *Bell v. Bell*, 13 Ir. Ch. Rep. 517.

It seems that the rule laid down in *Leake v. Robinson* (2 Mer. 363) is applicable also to equitable remainders of realty devised to a class. *Walker v. Mower*, 16 Beav. 365; *Blagrove v. Hancock*, 16 Sim. 371.

But it is otherwise with regard to legal devises of real estate, by way of remainder to a class, inasmuch as when, during the continuance of the particular estate, any of the class attain the specified description, the whole remainder vests in them, subject to let in others, who afterwards attain the same description during that period, and upon the termination of particular estate, those only of the objects will take who have then attained the specified description, to the exclusion of all others who may afterwards do so. *Mogg v. Mogg*, 1 Mer. 654.

But if none of the objects have attained the specified description upon the termination of the particular estate, the remainder will fail. Thus in *Festing v. Allen*, 12 Mees. & W. 279, where a testator, seised in fee of freehold estates, devised them to trustees to the use of his granddaughter A. for life, "and from and after her decease, to the use of all and every the child or children of her the said A., *who shall attain the age of twenty-one years*," to hold as tenants in common, and not as joint tenants, and to their several and respective heirs,

&c. "And for want of any such issue," he directed that his trustees should stand possessed thereof, in trust as to one moiety to permit B. C. the wife of his grandson D. C. to receive the rents and profits during her life, for the maintenance and education of all and every the child or children of his said grandson D. C. lawfully begotten, *who should attain the age of twenty-one years*, to hold as tenants in common and not as joint tenants, and to their several and respective heirs. And as to the other moiety, to stand possessed thereof to the use of E. for life, and from and after her decease, to the use of all and every the child or children of the said E. lawfully begotten, *who should attain the age of twenty-one years*, to hold as tenants in common in fee." The testator died in 1824, leaving him surviving his granddaughter A., the said B. C. the wife of D. C., who had four children, and the said E. who had seven children. A. married in 1825, and died in 1833, leaving three children who were *infants at the time of her death*. Some of the children of B. C. and D. attained the age of twenty-one. It was held by the Court of Exchequer that A. was tenant for life, with a contingent remainder in fee *to such of her children as should attain twenty-one*, and as no child attained twenty-one when the particular estate determined by her death, the remainder was necessarily divested, and the children took no interest in the estate devised. It was also held, that the limitations over were divested by the same event, and that the estate vested in the heir-at-law.

See also *Alexander v. Alexander*, 16 C. B. 59; *Doe d. Winter v. Perratt*, 9 C. & F. 606; *Holmes v. Prescott*, 12 W. R. (V. C. W.) 636; *Rhodes v. Whitehead*, 2 Drew. & Sm. 532; *Price v. Hall*, 5 L. R., Eq. 399.

Rule as applicable to Persons or Classes of Persons answering a particular Description.

As, according to the principles before laid down, a limitation of property, in order to be valid, must take effect necessarily, if at all, within the limits of the rule, it follows that if there be a limitation to a person not *in esse*, which is only to vest on his attaining some particular qualification or description, *not necessarily attainable, if at all*, within the period of a life then in existence, and twenty-one years afterwards, it will be void *ab initio*, independent of future events, by which that qualification or description may have been attained within the before-mentioned period. Thus, if there be a devise to the son (not *in esse*) of a person then living, if he should be bred a clergyman and be in holy orders (*Procter v. Bishop of Bath and Wells*, 2 H. Black. 358), or succeed to a barony (*Tollemache v. Earl of Coventry*, 2 C. & F. 611; 8 Bligh, 547; overruling *S. C. nom. Lord Deerhurst v. Duke of St. Albans*, 5 Madd. 232; and see *Tregonwell v. Sydenham*, 3 Dow, 194; *Macworth v. Hinzman*, 2 Keen, 658; *Bacon v. Proctor*, T. & R. 31), the gift will be void, because it is uncertain whether he will attain the necessary qualification within the limits allowed by the rule.

And where a gift is made to a class answering a certain description, which may include individuals coming into existence at a time beyond the limits allowed by the rule against perpetuities, it will be void.

This is well illustrated and laid down in the important and leading case of *Jee v. Audley*, 1 Cox, 324; there a testator, after a life interest to his wife, added, "I give 1,000*l.* unto Mary Hall, and the issue of her body lawfully begotten and to be begotten, and in default of such issue, I give the said 1,000*l.* to be equally divided between the daughters then living of John Jee and his wife Elizabeth Jee." It appeared that John Jee and Elizabeth Jee were living at the death of the testator, had four daughters and no son, and were of a very advanced age. Upon a bill being filed by the four daughters of John and Elizabeth Jee, to have the 1,000*l.* secured for their benefit in the event of Mary Hall having no children, the question arose whether the limitation to the daughters of John and Elizabeth Jee was not void, as being too remote; and to prove it so, it was said, that this was to take effect on a general failure of issue of Mary Hall, and though it was to the daughters of John and Elizabeth Jee, yet it was not confined to the daughters living at the death of the testator, and, consequently, it might extend to after-born daughters, in which case it would not be within the limit of a life or lives in being and twenty-one years afterwards, beyond which time an executory devise is void.

On the other side it was said, that though the late cases had decided, that on a gift to children generally, such children as should be living at the time of the distribution of the fund should be let in, yet it would be very hard to adhere to such a rule of construction so rigidly as to defeat the evident intention of the testator in this case, especially as there was no real possibility of John and Elizabeth Jee having children after the testator's death, they being then seventy years old; that if there were two ways of construing words, that should be adopted which would give effect to the disposition made by the testator; that the cases which had decided that after-born children should take, proceeded on the implied intention of the testator, and never to give an effect to words which would totally defeat such intention.

However, Sir Lloyd Kenyon, M. R., held, that the limitation to the daughters of John and Elizabeth Jee was too remote, as it might take in after-born daughters. "Several cases," said his Honor, "determined by Lord Northington, Lord Camden and the present Chancellor, have settled that children born after the death of the testator shall take a share in these cases; the difference is, where there is an immediate devise, and where there is an interest in remainder: in the former case, the children living at the testator's death only shall take; in the latter, those who are living at the time the interest vests in possession: and this being now a settled principle, I shall not strain to serve an intention at the expense of removing the

landmarks of the law; it is of infinite importance to abide by decided cases, and, perhaps, more so on this subject than any other. The general principles which apply to this case are not disputed: the limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being, and twenty-one years or nine or ten months afterwards. This has been sanctioned by the opinion of Judges of all times, from the time of the *Duke of Norfolk's case* (3 Ch. Ca. 1) to the present; it is grown reverend by age, and is not now to be broken in upon: I am desired to do in this case something which I do not feel myself at liberty to do, namely, to suppose it impossible for persons in so advanced an age as John and Elizabeth Jee to have children; but if this can be done in one case it may in another, and it is a very dangerous experiment and introductive of the greatest inconvenience, to give a latitude to such sort of conjecture. Another thing pressed upon me, is to decide on the events which have happened; but I cannot do this without overturning very many cases. The single question before me is, not whether the limitation is good in the events which have happened, but whether it was good in its creation; and if it were not, I cannot make it so. Then must this limitation, if at all, *necessarily* take place within the limits prescribed by law? The words are "in default of such issue, I give the said 1,000*l.* to be equally divided between the daughters then living of John Jee and Elizabeth his wife." If it had been to "daughters now

living," or "who should be living at the time of my death," it would have been very good; but as it stands, this limitation may take in after-born daughters; this point is clearly settled by *Ellison v. Airey* (1 Ves. 111) (and the effect of law on such limitation cannot make any difference in construing such intention). If then this will extended to after-born daughters, is it within the rules of law? Most certainly not, because John and Elizabeth Jee might have children born ten years after the testator's death, and then Mary Hall might die without issue fifty years afterwards; in which case it would evidently transgress the rules prescribed. I am of opinion, therefore, though the testator might possibly mean to restrain the limitation to the children who should be living at the time of the death, I cannot, consistently with decided cases, construe it in such restrained sense, but must intend it to take in after-born children. This, therefore, not being within the rules of law, and as I cannot judge upon subsequent events, I think the limitation void." See also *Hodson v. Ball*, 14 Sim. 558; *Lett v. Randall*, 3 Sm. & G. 83; *In re Sayer's Trusts*, 6 L. R., Eq. 319; *Stuart v. Cockerell*, 7 L. R., Eq. 363; 5 L. R., Ch. App. 363; *Garland v. Brown*, 10 L. T., N. S. 292.

It is clear that property may be given by will or secured by settlement to the unborn children of a person *in esse*, as for instance, a tenant for life. See *Avern v. Lloyd*, 5 L. R., Eq. 383; *Stuart v. Cockerell*, 7 L. R., Eq. 366.

The limitations, moreover, fol-

lowing the gifts to such unborn children for life will be good, provided the ascertainment of the persons to take under such limitations be not postponed beyond the limits of the rule against perpetuities. *Stuart v. Cockerell*, 7 L. R., Eq. 366.

In the case of *Avern v. Lloyd*, 5 L. R., Eq. 383, which was in effect a bequest to A. and B. for life, with remainder to their issue (unborn) for life, remainder to the executors, administrators, and assigns of A. and B. or their issue, who should happen to be such survivor, it was held by Stuart, V.-C., that the ultimate limitation to the executors, administrators and assigns of the tenants for life was not too remote, upon the ground that it must take effect in the lifetime of one of the unborn issue to whom a good estate for life was given, so as to give him an absolute estate in possession when he became survivor. See however the remarks of Malins, V.-C., thereon in *Stuart v. Cockerell*, 7 L. R., Eq. 368, 369.

It has been held that an estate may be given to unborn persons for life as tenants in common with cross remainders between them for life (see *Ashley v. Ashley*, 6 Sim. 358). Sir R. Malins, V. C., doubts the authority of this case, inasmuch as "every cross limitation must be either a remainder upon an estate tail, or it must be a cross executory bequest or limitation, limited so as necessarily to take effect within a life in being and twenty-one years afterwards." See *Stuart v. Cockerell*, 7 L. R., Eq. 370.

If, moreover, an estate were given to A. for life, with remainder to his children as tenants in common in fee, with a proviso that if any one of the *unborn* children should die without issue living at the time of his death, his share should go over, the gift over would be clearly invalid as being a cross limitation to take effect at the death of an unborn person. *Stuart v. Cockerell*, 7 L. R., Eq. 370.

So if there were a gift to A. for life, remainder to his unborn children as tenants in common in fee, with a proviso that if any of the children should die under the age of *twenty-two* years, the shares given to them should go over, the original gift to them as tenants in fee is good, but the cross limitations would be void as too remote. *Stuart v. Cockerell*, 7 L. R., Eq. 370.

Therefore it is usual that on such limitations, with cross limitations in fee, the gifts over are made to take effect upon the death of the children under twenty-one, which would clearly be within the rule. *Ib.*

Where leaseholds or chattels personal are vested in trustees upon trusts corresponding with land in strict settlement, but so that they are not to vest in *any* tenant in tail in possession till he shall attain the age of twenty-one, the period of vesting will be too remote; and it is immaterial that the intermediate rents and profits of the leaseholds are given to persons answering one of these descriptions, viz., that of tenant in tail in possession, until a person answering to the other description, viz. that of being of the age of twenty-one years, comes into

T. L. C.

existence. Thus in the well-known case of *Ibbetson v. Ibbetson*, 5 My. & Cr. 26, a testator being under his marriage settlement seised of the reversion of an estate, expectant on his decease without issue male, devised it to his brother for life, with remainder to his first and other sons in tail male, with divers remainders over, and he bequeathed chattels to trustees in trust to permit the same to be used and enjoyed by the person and persons who, for the time being, should be entitled to the possession of his estate, *until a tenant in tail, of the age of twenty-one years, should be in possession of his estate*, under his marriage settlement or his will, and then they were to go to such tenant in tail. The testator's brother had a son born at the date of the will, who, at the death of his father the tenant for life, had attained twenty-one years of age. It was held, nevertheless, by Lord Cottenham, C., affirming the decision of Sir L. Shadwell, V. C. (reported 10 Sim. 495), that the gift of the chattels to the first tenant in tail of the age of twenty-one was too remote. "There might," said his Lordship, "be successive tenancies in tail, lasting for any number of years, without any one tenant in tail in possession attaining twenty-one; and as the estate could not remain suspended, if such contingency should not happen within the period limited by the rule of law, so the possibility of such contingency not happening within the limited period renders the gift void, although the contingency has, in fact, happened within that period."

I I

In the very important and much-discussed case of *Lord Dungannon v. Smith*, 12 C. & F. 546, Lord Dungannon gave his leasehold estates to trustees in trust for his grandson Arthur, for life, and after his decease to *permit* such person, who for the time being would take by descent as heir male of the body of his grandson, to take the profits thereof *until some such person should attain the age of twenty-one years, and then to convey the same unto such person so attaining the age of twenty-one years*, his executors, administrators and assigns, with executory gifts over. Upon a bill filed by the next of kin of the testator claiming the leaseholds, it was held by the Lord Chancellor and Master of the Rolls of Ireland (1 Flan. & K. 639; 1 Dru. & Warr. 543, n.), that the property was undisposed of in consequence of the remoteness of the bequest. From this decision the late Lord Dungannon, who was the eldest son of the testator's grandson Arthur, *and who had attained twenty-one in his father's lifetime*, appealed. The case was discussed on both sides, as Lord St. Leonards justly observes, with great learning and ability, and the arguments will repay the student's careful perusal. Sugd. Prop. 344. The majority of the Judges, viz. Tindal, C. J., Williams, Coltman, Maule, Wightman and Cresswell, JJ., and Alderson, Rolfe and Platt, BB., delivered opinions against the validity of the bequests subsequent to the gift of the grandson, while Parke, B., and Patteson, J., were in favour of their validity. The

House of Lords affirmed the decision of the Court below, on the ground of the remoteness of the bequests under which the appellant claimed. Lord Lyndhurst, C., in proposing the affirmance of the decree of the Court below, observed, —“The disposition of the leasehold premises, of the corpus, was to be to a person answering two descriptions: he was to be heir male of the body taking by descent from Arthur the grandson, and he was to be of the age of twenty-one years. It is quite obvious that those two circumstances might not combine for many generations; and, indeed, it is possible that they might never combine. It is obvious, therefore, that this disposition of the property is void for remoteness; for, as everybody knows, property of this description must vest, if at all, within a life or lives in being, and twenty-one years afterwards, and, to speak with perfect correctness, a few months for gestation. It is wholly immaterial in this case, that there was a person twenty-one years of age answering the description at the time; that is, to make use of a phrase of a noble and learned lord in the case of *Tollemache v. The Earl of Coventry* (2 C. & F. 611), that it was a pure accident, it might or it might not have happened. *Unless it is absolutely certain that the event must happen* within the period prescribed, it is quite clear that the rule of remoteness applies to this case, and the devise becomes altogether void. . . . But, my Lords, it is supposed that this gift of the corpus of the estate is operated upon in

some degree by the disposition of the intermediate rents and profits. The disposition of the intermediate rents and profits is to the person who for the time being should take by descent as heir male of the body of the grandson, until some such person shall have attained the age of twenty-one years. Now the disposition of the corpus of the estate is to a party answering two descriptions or qualities. The intermediate rents and profits are taken by a person or persons who answer one of these descriptions. It appears to me, that the dispositions can exist entirely unconnected with each other, that they have no necessary relation to each other, and that the disposition of the rents and profits to particular individuals under this will, no more affects the disposition of the corpus of the estate, than if that disposition had been made to mere strangers." See also *Ker v. Lord Dungannon*, 1 Dru. & Warr. 509; *Harvey v. Harvey*, 5 Beav. 134; *Wainman v. Field*, Kay, 507; *Harding v. Nott*, 26 L. J. (Q. B.) 244.

Where, however, personalty is settled with reference to the limitations of real estate, there is a direction to the effect that the personalty shall not vest in any tenant in tail *by purchase* until he shall attain twenty-one, such direction will not offend the rule against perpetuities, inasmuch as a tenant in tail by purchase must come into esse during the life of the parent tenant for life. *Christie v. Gosling*, 1 L. R., H. L. 279, when the House of Lords, dissentiente Lord St. Leonards, affirmed the decision of Lord West-

bury, nom. *Gosling v. Gosling*, 1 De G., J. & S. 1, reversing the decision of Lord Romilly, M. R., reported 32 Beav. 58; see also *Martelli v. Holloway*, 5 L. R., H. L. 532, affirming the decision of Sir John Stuart, V. C., reported 6 L. R., Eq. 523, nom. *Holloway v. Webber*.

The very able judgment, however, of Lord St. Leonards in *Christie v. Gosling*, 1 L. R., H. L., contains very weighty arguments against the decision of the majority of Peers, which is founded upon a somewhat forced construction of the words "tenant in tail," to which their lordships, from the context, attributed the meaning of "tenant in tail by purchase." See p. 295.

It is somewhat doubtful as to the effect of the words "as far as the rules of law and equity permit," or "as far as the law allows," in restraining such gifts within the rule against perpetuities. See *Tollemache v. Earl of Coventry*, 2 C. & F. 611; 8 Bl., N. S. 547; 12 C. & F. 555, note; *Ker v. Lord Dungannon*, 1 Dr. & Warr. 536; *Mackworth v. Hinzman*, 2 Kee. 658.

It is clear, however, that these words do not make the trust of chattels an executory trust and not a direct gift, so as to enable the Court to carry out the general intent of the testator, and without any direction to that effect, carry over the chattels within certain limits to go along with real estate on a tenant in tail dying under twenty-one without issue. *Countess of Harrington v. Earl of Harrington*, 5 L. R., H. L. 107; *Lord Glenorchy*

v. *Bosville*, 1 L. C. Eq. 35, 36, 37, 5th ed.

Where there is a trust by will of chattels, for persons to whom the actual possession of estates may accrue under a previous settlement, such chattels to be enjoyed with the estates, so far as the rules of law and equity will permit, and there is a direction that such chattels shall not vest absolutely in a person entitled to the estates for an estate of inheritance, unless he attain twenty-one, or die under that age leaving issue inheritable, it seems that the limitations of the will are valid to carry over the chattels, in the event of a person taking them not attaining twenty-one or leaving issue, to the person becoming entitled to the estates. See *Countess of Harrington v. Earl of Harrington*, 5 H. L. Ca. 87, in which case it was unnecessary to decide this point, as the owner of the estates was clearly entitled to the chattels as residuary legatee.

In the absence of such direction the personal chattels would become the absolute property of the first tenant in tail in possession of the real estate, although he might be an infant, and afterwards die without issue; and in such an event the ownership of the personal chattels would be disjoined and severed from the settled real estates. See *Countess of Harrington v. Earl of Harrington*, 5 L. R., H. L. 101, 102, per Lord Westbury.

Rule as it affects Powers and Appointments made in pursuance of them.

As a general rule, where a person

having an absolute interest in property gives to another a *particular* power,—that is to say, restricted to particular objects,—the latter in exercising his power can only limit the property in such a manner as the donor of the power could have done: in other words, the period from which the rule is to be reckoned as commencing to run is from the instrument *creating* (when a *deed*), and not from the instrument *executing*, the power. But in considering the rule it must be borne in mind, that the power itself will not be void because it embraces objects exceeding the limits of perpetuity, as the children of unborn children, or issue generally (*Griffith v. Pownall*, 13 Sim. 393; *Thomas v. Thomas*, 14 Sim. 234); and if the donee of the power exercise it in favour only of such objects as do not exceed the bounds of the rule against perpetuities, the appointment will be valid. *Hockley v. Mawbey*, 1 Ves. jun. 150; *Routledge v. Dorvil*, 2 Ves. jun. 357; *Attenborough v. Attenborough*, 1 K. & J. 296; *Stark v. Dakyns*, 10 L. R., Ch. App. 35.

In order to determine whether such appointment is valid, as being within the limits of the rule, it should be read as if inserted in the instrument creating the power; if the interest created by the exercise of the power exceeds the period allowed by the rule against perpetuities, it will fail for remoteness, if not, it will be good. For instance, if, under a settlement made previous to marriage, power is given to A. (who has a life interest) to appoint amongst his issue generally, and A.

appoint to a child for life, with remainder (without any restriction as to the time of their coming into esse) to the children of such child absolutely, it is clear that the remainder to the grandchildren will be void as against the rule of perpetuities, for if the appointment were read as if included in the settlement (which takes effect from its date), it would run thus: "to A. for life, remainder to his son (then unborn) for life, remainder to the grandchildren absolutely;" and reckoning from the date of the settlement, the grandchildren of A. would not *necessarily* be born within a life or lives in being and twenty-one years after. See *Robinson v. Hardcastle*, 2 Bro. C. C. 344; *Bristowe v. Warde*, 2 Ves. jun. 336; *Routledge v. Dorril*, Ib. 357; *Crompe v. Barrow*, 4 Ves. 681; *Brudenell v. Elwes*, 7 Ves. 382; *Thomas v. Thomas*, 14 Sim. 234.

Where a power is created by *will* (which takes effect not from its date, but *from the death of the testator*, ante, p. 465), the appointment must be read as if inserted in the will at the latter period; if, therefore, a testator give A. a power of appointment among A.'s issue (without any restriction as to the births of such issue), and a child of A. be born in the interval between the date of the will and the death of the testator, and A. make an appointment to his child for life, with remainder to his child's children, such appointment will be good, inasmuch as if inserted in the will, it would be unobjectionable, although if A.'s child had been born after the testator's death, it would have been

otherwise. *Duke of Devonshire v. Lord G. Cavendish*, 4 T. R. 741; *Peard v. Kekewich*, 15 Beav. 166; *Wilkinson v. Duncan*, 30 Beav. 111.

Restrictive words may be made use of, in an appointment under a particular power, enabling it to take in objects which, in their absence, would have fallen within the rule against perpetuities. Thus where there is a power to appoint to *issue generally*, whether under a deed or will, and at the date of the deed or the death of the testator there is no issue born to the donee, he might, nevertheless, make a valid appointment in favour of issue generally so as to include grandchildren, if he confined it to such issue as should be born during his the donee's life, or the life or lives of any other person or persons, and twenty-one years from the decease of such person or persons and the survivor. 1 Jarm. Wills, 272, 3rd ed.; Lewis, Perpet. 489; *Attenborough v. Attenborough*, 1 K. & J. 296.

Where a *general* power of appointment is given to the donee,—that is to say, under which he may give the whole or any interest to any person, even to himself,—the donee may exercise his power by gifts to persons which, had they been contained in the instrument creating the power, would have been void for remoteness. For instance, if A. had power to appoint property as he should think fit, and he should afterwards exercise the power by appointing to a son then living (but who was unborn at the time of the creation of the power), for life, with remainder to the children, then unborn, of such son, such an appoint-

ment would be good, although it would clearly have been bad if the donor had attempted to settle the property in that mode. *Lewis, Perpet.* 483.

The reason why the validity of appointments under *general* powers is not to be tested as *particular* powers, by reference to the instrument creating them, is this, that, by the former powers, the freedom of alienation is no more interfered with, than if an absolute interest had been vested in the donee, and, consequently, there is no tendency towards a perpetuity.

Having made these preliminary remarks as to the distinction between general and particular powers, we may next notice what appointments under *particular* powers have been held valid and what invalid, in respect of the rule against perpetuities.

Rule as affecting powers of appointment among children.

It may be first mentioned, that a person having a power to appoint property to children, absolutely, may appoint to them a limited interest therein, with a general power to appoint by *deed or will*, as the Court considers such appointment by the parent to be equivalent to a gift of the property, and not a delegation of the power. Thus in *Bray v. Bree*, 2 C. & F. 453, where, under a power in a settlement to appoint a fund to children, a parent appointed the fund to an only child for her separate use for life, remainder as she should by deed or will appoint, and in default of appointment, to the child, her execu-

tors or administrators. The child by her will appointed the fund, and died. It was held by the House of Lords, affirming the decision of Sir L. Shadwell, V. C. (reported 3 Sim. 513, nom. *Bray v. Hamersley*,) that the power in the settlement was well exercised by the parent, and that the child's appointment by her will carried the fund to her appointee.

And a similar appointment to an object of the power for life, with power to dispose by *will only*, is valid, if the object were in esse at the time of the creation of the power (*Phipson v. Turner*, 9 Sim. 227; see also *Brudenell v. Elwes*, 1 East, 442; *Morse v. Martin*, 34 Beav. 500; *Slark v. Dakyns*, 15 L. R., Eq. 307; 10 L. R., Ch. App. 35). Secus, if the object were not then in esse. See *Wollaston v. King*, 8 L. R., Eq. 165. There a testatrix, having under her marriage settlement power to appoint a fund in favour of the children of the marriage, by her will, in execution of the power, appointed a portion of the fund to her son C. for life, with remainder to such persons as he should by *will* appoint, it was held that the appointment in favour of C.'s appointees was void for remoteness.

Upon the same principle, where a person having under his marriage settlement a power to appoint amongst his children, appointed part of the trust funds to a daughter, then unmarried, for life, and after her death as she should by *will* appoint, it was held by Lord Selborne, L. C., that the power of appointment by will conferred on the daughter (who was unborn at

the date of the settlement) was void for remoteness, the gift to her for life only being valid. *Morgan v. Gronow*, 16 L. R., Eq. 1. And his Lordship observed that not only *Wollaston v. King* (8 L. R., Eq. 165), but principle, obliged him to arrive at that conclusion.

A restriction, however, in an appointment, which would render it invalid as being beyond the limit allowed by the rule against perpetuities, will sometimes be rejected so as to render the appointment valid. Thus in *Fry v. Capper*, Kay, 163, where a widow, having, under a settlement made previous to her marriage, a general power of appointment over a trust fund among her children, by will made an appointment amongst her six daughters equally, but directed that as to the shares of two of her daughters who were married, the trustees should stand possessed thereof, upon trust during the joint lives of her said two daughters respectively, and their respective husbands, to pay to them, *but not by way of anticipation*, the interest, dividends and annual produce of their respective shares for their separate use, without being liable to the debts or control of their husbands or husband respectively, and after the decease of her daughters respectively the will declared the trusts of their respective shares to be for their respective appointees by deed or will, and, in default, for their executors or administrators respectively. It was held by Sir W. Page Wood, V. C., that such an appointment was not void as fettering the property beyond the legal limits, as the re-

straint upon anticipation might be rejected, and the rest of the appointment sustained.

And where a similar appointment is made to a daughter unmarried at the date of the appointment, her subsequent marriage will not of itself operate as an adoption of the trusts of the fund appointed so as to establish the validity of the clause restraining anticipation. *In re Teague's Settlement*, 10 L. R., Eq. 564.

The restraint would, however, be valid as not offending against the rule relating to perpetuities, if the daughter had been in existence at the date of the instrument creating the power. If, for instance, a post-nuptial settlement were made by the father, after the birth of a daughter, under which he took a life interest, in a fund, with remainder as he should appoint, and he by will appointed the fund to his daughter for her separate use with a clause restraining anticipation, the restraint would be valid, as it would not extend beyond a life or lives in being. See *In re Cunynghame's Settlement*, 11 L. R., Eq. 327; *Thornton v. Bright*, 2 M. & C. 230.

It is clear, however, that where a power is executed in favour of persons as a class, some of whom cannot take, in consequence of the rule against perpetuities, the appointment will be altogether void, even with regard to those who might legally have taken, had the gifts been confined to them. See *Gee v. Audley*, 2 Ves. jun. 365, cited; 1 Cox, 324; *Routledge v. Dorril*, 2 Ves. jun. 357; *Harvey v.*

Stracey, 1 Drew. 73; *Palsgrave v. Atkinson*, 1 Coll. 190; *Grogan v. Dopping*, 6 Ir. Ch. Rep. 265; sed vide *Griffith v. Pownall*, 13 Sim. 393; *Ratcliffe v. Hampson*, 1 Jur. N. S. 1104.

Rule as affecting Powers of Charging, Powers of Sale and Powers of Sale and Exchange.

A power to charge, which is only to arise after a *general failure* of issue, some of whom only take under the settlement creating the power, is void for remoteness. *Bristow v. Boothby*, 2 S. & S. 465; sed vide *Eno v. Eno*, 6 Hare, 179.

Questions have sometimes been raised, how far general powers of sale, or of sale and exchange given to trustees, not restricted in their exercise as to time, are valid with respect to the law against perpetuities. *Ware v. Polhill*, 11 Ves. 257.

It seems to be clear that where the consent of the parties beneficially entitled is requisite (*Biddle v. Perkins*, 4 Sim. 135; *Powis v. Capron*, 4 Sim. 138, n.; *Boyce v. Hanning*, 2 Cro. & Jer. 334), and where the powers are collateral to estates tail, they are altogether unobjectionable, for they "may be barred by the owner of the preceding estate tail; and if once an estate in fee has been acquired by any one claiming under the limitations of the instrument by which the powers were created, they naturally ceased." Per Lord Chancellor Sugden, in *Cole v. Sewell*, 4 Dru. & Warr. 32; and see *Waring v. Coventry*, 1 My. & K. 248; *Wood v. White*, 2 Keen, 664; 4 My. & Cr.

460; *Wallis v. Freestone*, 10 Sim. 225; *Doncaster v. Doncaster*, 3 K. & J. 26; *Briggs v. Earl of Oxford*, 1 De G., M. & G. 363; *Nelson v. Callow*, 15 Sim. 353. Secus where the power is annexed to a term of years, precedent to the estate tail, and cannot therefore be barred (*Floyer v. Bankes*, 8 L. R., Eq. 115; and see *Case v. Drozier*, 5 M. & C. 246; *Sykes v. Sykes*, 13 L. R., Eq. 56; ante, p. 470).

Moreover, it seems now to be settled, that whether the reversion or remainder in fee simple be limited after estates tail or estates for life, a collateral power of sale, not restricted in point of time, will be a valid and subsisting power until either the estates tail are barred, or the fee simple is vested in possession; in either of which events the purpose of the settlement is spent and the power ceases. *Lantsbery v. Collier*, 2 K. & J. 709; *Taite v. Swinstead*, 26 Beav. 525; *Wolley v. Jenkins*, 23 Beav. 53; *Biddle v. Perkins*, 4 Sim. 135; *Nelson v. Callow*, 15 Sim. 35; *Waring v. Coventry*, 1 M. & K. 249.

If powers be given to trustees of estates put into strict settlement, during the minorities of persons entitled under the settlement, to manage and let the property and receive the rents and profits (*Lade v. Holford*, 1 Wm. Blacks. 428; Amb. 479; *Browne v. Stoughton*, 14 Sim. 369; *Scarisbrick v. Skelmersdale*, 17 Sim. 187; *Turvin v. Newcome*, 3 K. & J. 16), or to cut and sell timber (*Ferrand v. Wilson*, 4 Hare, 373), and invest the monies arising thereby in the purchase of

other lands to be settled to the same uses, unless the exercise of such powers is restricted to the period of the minorities of tenants in tail *by purchase*, they will be void as being too remote. In *Ferrand v. Wilson*, 4 Hare, 344, subject to the trusts of a term of twenty-one years, real estates were devised to A. for life, remainder to B. for life, with remainder to his sons successively *in tail*, with other remainders over for life and in tail, and power was given to the executors and the survivor of them, and the executors of the survivor, at *any time or times* not only during the term of twenty-one years, but at any time afterwards, *until some person entitled in possession to an estate tail, or some greater estate, should attain the age of twenty-one years*, to fell and sell the timber, and apply the proceeds in payment of funeral expenses, debts and legacies, the overplus from time to time to be invested, with the consent of the devisee in possession, in the purchase of lands to be settled to the same uses as the devised premises, the money in the mean time to be invested in government or real securities, and the dividends and interest to be paid to the persons who would be entitled to the rents and profits of the premises if the same had been purchased. It was held by Sir James Wigram, V. C., that the power was too remote, and it was declared, that the trusts concerning the timber to be felled by the executors during the term and at any time afterwards, until some person entitled in possession to an estate tail or some greater estate of and

in the said estates, should attain twenty-one years, and of the monies to arise by such timber respectively, were void for remoteness. See also *Hale v. Pew*, 25 Beav. 335; *Floyer v. Bankes*, 8 L. R., Eq. 115.

But trusts of this kind will be valid, where the fund to arise therefrom is to be applied in payments of incumbrances affecting the settled estates. See *Briggs v. The Earl of Oxford*, 5 De G. & Sm. 156; 1 De G., M. & G. 363; *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54, 65; and *Bateman v. Hotchkiss*, 10 Beav. 426.

Effect of a Limitation being too remote on subsequent Limitations.

Where a limitation is void as being too remote, any subsequent limitations are not thereby accelerated but are void also. Thus, in the well-known case of *Robinson v. Harcastle*, 2 Bro. C. C. 22, S. C. 2 T. R. 241, 380, 781, where a father having under his marriage settlement power to appoint among the *children* of the marriage, by his will gave a life interest to his son, and estates tail to his *grandchildren*, with remainder over in moieties to two daughters in fee; the appointment to the grandchildren being clearly bad, the question arose as to the validity of the remainder in fee to his daughters. And upon a case being sent by Lord Thurlow it was certified by the Court of King's Bench, that the devise over to the daughters was void. And Buller, J., observed, that if a subsequent limitation depended on a prior estate which was void, the subsequent one must fall with it; to

support the opposite argument the testator must be considered as intending, that if the first use was bad, the subsequent limitations should take place, which would be extraordinary indeed. See also *Cambridge v. Rous*, 8 Ves. 12; *Palmer v. Holford*, 4 Russ. 403.

Even if the object of the limitations void for remoteness should never exist, the subsequent limitations nevertheless cannot be supported. *Proctor v. Bishop of Bath and Wells*, 2 H. Black. 358; *Brudenell v. Elves*, 1 East, 442; and see *Beard v. Westcott*, 5 Taunt. 393; 5 B. & Ald. 801; T. & R. 25, and the remarks of Lord St. Leonards in *Monypenny v. Dering*, 2 De G., M. & G. 182; *Thatcher's Trust*, 26 Beav. 365.

But although, as we have before seen, a future limitation must necessarily, if at all, vest within the period allowed by the rule against perpetuities, and will not be rendered valid, if in the event which has happened the rule would not be offended against, nevertheless where a limitation over arises on alternative events, or as it is sometimes said, arises upon a contingency with a double aspect, one of which is within the rule, and the other exceeds its limits, the validity of the limitation over will depend upon the event. If, for instance, there were a bequest to A. for life, with a limitation to his son, then unborn, on his taking holy orders (which might not necessarily happen within twenty-one years after his father's death), and in case he should have no such son, or if A. should die without ever having had a son, then over.

The first limitation to a son of A. being too remote in the event of his death without having attained the necessary qualification, the gift over would not take effect, though it would if A. died without ever having had a son. Many other examples might be given. See *Longhead v. Phelps*, 2 Black. 704; *Crompe v. Barrow*, 4 Ves. 681; *Leake v. Robinson*, 2 Mer. 363; *Cambridge v. Rous*, 8 Ves. 12; *Beard v. Westcott*, 5 Taunt. 393; 5 B. & Ald. 801; T. & R. 25; *Minter v. Wraith*, 13 Sim. 52; *Goring v. Howard*, 16 Sim. 395; *Monypenny v. Dering*, 2 De G., M. & G. 145; *Cambridge v. Rous*, 25 Beav. 409.

And where a devise over includes two contingencies, which are in their nature divisible, and one of which may take effect as a remainder, they may be divided, though included in one expression. *Evers v. Challis*, 7 H. L. Cas. 531, 547; but see *Re Thatcher's Trust*, 26 Beav. 365.

And "where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over which is within the line of perpetuities, effect cannot be given to such a clause, unless it will dovetail in and accord with previous limitations which are valid." Per Lord St. Leonards, C., in *Monypenny v. Dering*, 2 De G., M. & G. 182. *Taylor v. Frobisher*, 5 De G. & Sm. 191; *Re Thatcher's Trust*, 26 Beav. 365.

Cases where the Rule does not apply.

The rule against perpetuities does not apply to trusts directed for the accumulation of income

during any period for the payment of the settlor's debts on the estate. *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54, 65; *Bateman v. Hotchkin*, 10 Beav. 426; *Briggs v. Earl of Oxford*, 1 De G., M. & G. 363.

Again, where a limitation is so framed as that the gift under it *vests*, that is to say, becomes transmissible and alienable, by the person taking it, within the period allowed by the rule, it is immaterial that it is directed to be accumulated (*Saunders v. Vautier*, 4 Beav. 115; 1 Cr. L. Ph. 240; *Hilton v. Hilton*, 14 L. R., Eq. 468), or the possession or term of enjoyment is postponed beyond the legal period; for in such case the clause postponing enjoyment will, so far as it exceeds such period, be considered void, and the gift consequently be to that extent accelerated. Thus in *Murray v. Addenbroke*, 4 Russ. 407, a testator gave the residue of his property to his wife for life, and at her demise to the eldest surviving son of Sir John Murray *upon his coming to the age of twenty-five years* (the trustees being directed to apply the interest to his use after the death of the tenant for life, until he should attain twenty-five); or, failing such issue male, to the daughters of Sir John Murray *living at the time of the demise of the last of such issue male*, in equal proportions. The only son of Sir John Murray died before he attained twenty-five years of age, in the lifetime of the widow, leaving two daughters of Sir John Murray surviving him. It was held by Lord Chancellor Lyndhurst, that if there had been any son of Sir John Murray living at the death

of the widow he would have taken a vested interest in the residue, though he had not then attained the age of twenty-five; and that therefore the gift over to the daughter of Sir John Murray was not too remote, and that in the event which happened, upon the death of the widow, they became entitled to the residue. "It appears to me," said his Lordship, "that the whole interest is given to the son; the whole of it is to be applied to the use of the son, though the manner in which it is to be so applied is left to the discretion of the trustees; and, therefore, as the whole interest is given immediately upon the death of the widow, the eldest surviving son would, upon her death, have taken a vested interest in the residue. Therefore the gift to the son is not too remote. . . . The limitation of the residue to the daughters is not too remote, and the intention of the testator, as expressed in the terms he has used, is obviously this,—that the eldest son surviving the widow shall take, and if there be no son surviving the widow, that the daughters who are living at the death of the last son, who died in the lifetime of the widow, shall take the property in equal shares." See also *Farmer v. Francis*, 9 Moo. 310; 2 Bing. 151; *Dodson v. Hay*, 3 Bro. C. C. 404; *Montgomerie v. Woodley*, 5 Ves. 522; *Bingley v. Broadhead*, 8 Ves. 415; *Kevern v. Williams*, 5 Sim. 171; *Bland v. Williams*, 3 My. & K. 411; *Blease v. Burgh*, 2 Beav. 221; *Doe d. Dolley v. Ward*, 9 Add. & Ell. 582; *Saunders v. Vautier*, 4 Beav. 115; 1 Cr. & Ph. 240; *Greet v. Greet*, 5

Beav. 123; *Harrison v. Grimwood*, 12 Beav. 192; *Jackson v. Majoribanks*, 12 Sim. 93; *Milroy v. Milroy*, 14 Sim. 48; *Marquis of Bute v. Harman*, 9 Beav. 320; *Gosling v. Gosling*, Johns. 265; *Tatham v. Vernon*, 29 Beav. 604; *In re Jacob's Will*, Ib. 402; *Bell v. Cade*, 2 J. & H. 122; *Dennis v. Frend*, 14 I. Ch. Rep. 271; *Coventry v. Coventry*, 2 Drew. & Sm. 470.

It is often a difficult question to determine whether the postponement is applicable to the vesting or only to the possession or enjoyment; and the Courts have adopted a mode of construction wholly independent of what the result may be; so that if the postponement, being beyond the limits of the rule, according to the strict rules of reading the instrument in which the gift is contained, applies to the vesting, the gift will be void. See *Leake v. Robinson*, 2 Mer. 363; *Bull v. Pritchard*, 1 Russ. 213; *Palmer v. Holford*, 4 Russ. 403; *Vawdry v. Geddes*, 1 Russ. & My. 203; *Judd v. Judd*, 3 Sim. 525; *Hunter v. Judd*, 4 Sim. 455; *Porter v. Fox*, 6 Sim. 485; *Dodd v. Wake*, 8 Sim. 615; *Newman v. Newman*, 10 Sim. 51; *Ring v. Hardwick*, 2 Beav. 352; *Griffith v. Blunt*, 4 Beav. 248; *Leach v. Leach*, 2 Y. & Coll. C. C. 495, 499; *Bull v. Pritchard*, 5 Hare, 567; *Boughton v. James*, 1 Coll. 26; 1 H. L. Cas. 406; *Comport v. Austen*, 12 Sim. 218; *Speakman v. Speakman*, 8 Hare, 180; *Boydell v. Golightly*, 14 Sim. 327; *Pickford v. Brown*, 2 K. & J. 426; *Courtier v. Oram*, 21 Beav. 91; *Read v. Gooding*, 21 Beav. 478; *Lett v. Randall*, 3 Sm. & Giff. 83; *Rowland v. Tawney*, 26

Beav. 167; *In re Blakemore's Settlement*, 20 Beav. 214.

If it appears that the members composing the class to which the gift is made are to be ascertained immediately upon the death of the testator, the question as to whether postponement applies to vesting or enjoyment is immaterial. *Elliott, v. Elliott*, 12 Sim. 276; *Leach v. Leach*, 2 Y. & Coll. C. C. 495.

Although a perpetuity would arise where a rent is granted to a person who may not be in esse until after the line of perpetuity is passed; nevertheless where the estate in the rent is vested in an existing person and his heirs in fee simple, who may deal with it at his or their pleasure, and as he or they think fit, it is not subject to the objection of remoteness, notwithstanding that its actual enjoyment may depend upon a contingency which may never happen or may happen at any time, however distant. Pow. 8th ed. 16; *Gilbertson v. Richards*, 4 H. & N. 277; 5 H. & N. 453.

Where an absolute gift is made, it will not be qualified or cut down by any subsequent gift or clause obnoxious to the rule against perpetuities, but will be construed as though such latter gift or clause, whether contained in the same or a subsequent instrument, had no existence. *Carver v. Bowles*, 2 Russ. & My. 304; see also *Ring v. Hardwick*, 2 Beav. 352.

Upon the same principle, in the case of *Arnold v. Congreve*, 1 Russ. & My. 209, a testatrix, having by her will given to her grandchildren (the gift not being confined to those living at her death) absolute in-

terests, by her codicil expressed her desire that they should only take life interests, in order that their children might take in succession after their deaths. It was held by Sir John Leach, M. R., that the object of the testatrix in making the codicil being for the purpose of letting in the children of the grandchildren, necessarily failed; and that as the great-grandchildren could not take, the intention of the testatrix would be best effectuated by holding that the *absolute interests given to the grandchildren by the will were not destroyed by the codicil*. See also *Kampf v. Jones*, 2 Keen, 756; *Ring v. Hardwick*, 2 Beav. 352; *Church v. Kemble*, 5 Sim. 525; *Wells v. Malins*, 3 Jur. 36; *Scawin v. Watson*, 10 Beav. 200; *Gosling v. Gosling*, Johns. 265; *Saumarez v. Saumarez*, 4 My. & Cr. 331; *Blacket v. Lamb*, 14 Beav. 482; *Harvey v. Stracey*, 1 Drew. 73; *Hobbs v. Parsons*, 2 Sm. & Giff. 212; *Stephens v. Gadsden*, 20 Beav. 463; *Gerrard v. Butler*, 20 Beav. 541; *Courtier v. Oram*, 21 Beav. 91.

Where, moreover, a power has been well executed, but a restraint is put upon anticipation, which is void for remoteness, the anticipation will be rejected. *Fry v. Capper*, Kay, 163; *Armitage v. Coates*, 35 Beav. 1; *In re Teague's Settlement*, 10 L. R., Eq. 564; *In re Cunynghame's Settlement*, 11 L. R., Eq. 324, ante, p. 487.

It may here be mentioned, that the Court will not in general raise estates by implication, which in other cases it will sometimes do in favour of the intention, if the effect

would be, that such estates would be void for remoteness. *Chapman v. Brown*, 3 Burr. 1626; *Monypenny v. Dering*, 16 Mees. & W. 437.

Upon the same principle, where there is an executory trust which, if carried literally into effect, would be void as infringing upon the rule against perpetuities, the Court of Chancery, in order to carry out the intention of the creator of the trust as far as possible, will direct a settlement to be made complying with the rule, but which will be as strict as the law will permit. *Humberston v. Humberston*, 1 P. Wms. 332; *S. C.*, 2 Vern. 737; *Prec. Ch.* 455; *Bankes v. Baroness Le Despencer*, 10 Sim. 576; *Lincoln v. Duke of Newcastle*, 3 Ves. 387; 12 Ves. 218; *Woolmore v. Burrows*, 1 Sim. 512; *Lord Dorchester v. Earl of Effingham*, 10 Sim. 587, 588, n.; 3 Beav. 180, n.; *Williams v. Teale*, 6 Hare, 239, and cases there cited; *Tennent v. Tennent*, Dru. 161; *Boswell v. Dillon*, Ib. 291; *Trevor v. Trevor*, 13 Sim. 108; 1 H. L. Cas. 239; *Boydell v. Golightly*, 14 Sim. 346; *White v. Briggs*, 15 Sim. 17; *Lyddon v. Ellison*, 19 Beav. 565; and see note to *Lord Glenorchy v. Bosville*, 1 L. Cas. Eq. 1, 5th ed.

The Courts have also, according to the doctrine of *cy près*, by sacrificing the particular intention of a testator, which cannot be carried out in consequence of its being contrary to the rule against perpetuities, given effect to his general intention in a mode which is within the rule. As where a life interest in property is devised to an unborn person for life, with remainder to his first and other sons

in tail, the remainder in such case being clearly invalid as being beyond the limits allowed by the rule, the Courts, seeing that it is the testator's general intention to benefit the issue, though it cannot be done in the particular mode pointed out, carry out the general intention by giving an estate tail to the unborn person, to which, if not barred, the issue may ultimately become entitled. *Nicholl v. Nicholl*, 2 W. Black. 1159; *Robinson v. Harcastle*, 2 T. R. 241, 380, 781; *Hopkins v. Hopkins*, Co. Litt. 272 a, Butler's note, 1, vii. 2; 1 Atk. 581.

And an estate tail has been given to the first taker, even where the limitation was to his *children as tenants in common in tail*, although it will be observed, that an estate tail which would descend to the children successively, does not very accurately carry out the intention of the testator, that they should take concurrently. See *Pitt v. Jackson*, 2 Bro. C. C. 51; 2 Ves. jun. 349; *Smith v. Lord Camelford*, 2 Ves. jun. 698; and see ante, p. 344; see also *Vanderplank v. King*, 3 Hare, 1; *Williams v. Teale*, 6 Hare, 239; *Stackpoole v. Stackpoole*, 4 Dru. & Warr. 320.

But although, as in the last cited cases, by the doctrine of *cy près* a different provision may be made, for persons for whom the testator intended to provide, an estate cannot be carried to a class or a portion of a class for whom the testator never intended to provide. *Monypenny v. Dering*, 2 De G., M. & G. 145, 175, overruling the decision of Sir James Wigram, V. C., reported 7 Hare,

568; *Parfitt v. Hember*, 4 L. R., Eq. 443.

The doctrine of *cy près* appears to have been first established in *Humberston v. Humberston*, 1 P. Wms. 332; *S. C.*, 2 Vern. 737; Prec. Ch. 455, where the trusts were executory; it has, however, as we have seen, become a rule of construction, and is not confined to cases where the testator has made a will of an executory character (ante, 409; and see *Parfitt v. Hember*, 4 L. R., Eq. 446). And it applies not only to ordinary devises but to the execution of a power by will. *Line v. Hall*, 22 W. R. 124.

Nor will the doctrine be applicable where successive life interests (*Seaward v. Willock*, 5 East, 198), or successive terms of years determinable upon the death of the devisee (*Somerville v. Lethbridge*, 6 T. R. 213; *Beard v. Wescott*, 5 B. & Ald. 81; T. & R. 25) are given; nor where the children of the unborn person to whom a life interest is given take an estate in fee simple. *Bristow v. Warde*, 2 Ves. jun. 336; *Hale v. Pew*, 25 Beav. 335.

Where, however, after an estate tail is given, either expressly (*Hugo v. Williams*, 14 L. R., Eq. 224; *Ruee v. Steel*, 2 Sim. 233) or by implication (*Mortimer v. West*, 2 Sim. 274; *Wollen v. Andrewes*, 2 Bing. 126; *Brooke v. Turner*, 2 Bing. N. C. 422; *Parfitt v. Hember*, 4 L. R., Eq. 443), words of the testator indicating that persons taking under the limitation of the will successively are to take during their lives only, will be rejected, and will not have

the effect of cutting down the estate of inheritance. Such words will in effect be taken to mean only that which is necessarily implied, that whoever takes under the limitation can only in point of fact have the enjoyment of it during his life. See *Hugo v. Williams*, 14 L. R., Eq. 226.

The result is the same where an estate in fee simple is given, followed by the words "during life," as the latter words will be rejected as repugnant to the others. *Doe d. Elton v. Stenlake*, 12 East, 515; and see *Forsbrook v. Forsbrook*, 3 L. R., Ch. App. 93.

The doctrine of *cy près* is not applicable to personal estate (*Routledge v. Dorril*, 2 Ves. jun. 357, 365; *Knight v. Ellis*, 2 Bro. C. C. 570); nor, it seems, to a mixed fund. *Boughton v. James*, 1 Coll. 44; 1 H. L. Ca. 406.

Lastly, the doctrine is not applicable in the construction of deeds. *Brudenell v. Elwes*, 7 Ves. 382.

Exceptions from the Rule against Perpetuities.

One exception from the rule against perpetuities is where land is purchased, or property held, by a corporation. But as corporations cannot in general purchase real estate without licence from the crown, which will be withheld except in proper cases, no perpetuity will be created, unless for the public good, or to an extent which would not create any appreciable abstraction of land from commerce. Shelf. Mortm. 39; Burt. Comp. 68.

Moreover, gifts to charities do not fall within the rule against perpetuities, a gift in perpetuity to a

charity being valid; though with respect to land, the requisitions of 9 Geo. 2, c. 36, must be complied with. Hence a contingent limitation over of property from one charity to another, in an event which in the case of individuals would render the limitation void, as being in contravention of the rule against perpetuities, is good. See *Christ's Hospital v. Grainger*, 1 Mac. & G. 460; *Tudor's Charitable Trusts*, p. 251, 2nd ed.

And as the rule against perpetuities has passed as part of the law of England into our colonies (ante, p. 466), the exception in favour of charities may properly be assumed to have passed likewise with the rule into the laws of our colonies. *Neo v. Neo*, 6 L. R., P. C. C. 394.

But a perpetuity cannot be created in favour of individuals through the intervention of a charitable corporation (see *Hope v. Corporation of Gloucester*, 7 De G., M. & G. 647; *Attorney-General v. Cathern Hall*, Jac. 381; *Attorney-General v. Greenhill*, 33 Beav. 196). But see *Pollock v. Booth*, 9 I. R., Eq. 229, 607, as to the validity of a covenant for renewal for successive lives to be nominated by lessees.

The question sometimes arises, where property is tied up for an indefinite time, whether the object of the gift is charitable or not, because if it be not it is void. Thus, if a devise of land to trustees of a library, to hold to them and their successors for ever, for the maintenance and support of the library, was held to come within the rule against perpetuities. *Carne v. Long*, 2 De G., F. & J. 75; see also *Thomson*

v. *Shakespear*, 1 De G., F. & J. 399; *Neo v. Neo*, 6 L. R., P. C. 381; *In re Clark's Trusts*, 1 Ch. D. 497; *Re Dutton*, 4 Ex. D. 54.

Another exception to the rule of perpetuities is where property is by act of parliament strictly entailed upon certain families in reward for public services, as in the case of the first Duke of Marlborough (3 & 4 Anne, c. 6; 5 Anne, c. 3; 5 Anne, c. 4) and the first Duke of Wellington (54 Geo. 3, c. 161).

Another exception to the rule against perpetuities is where a grant has been made to a person in tail of the purchase or provision of the crown, in reward of services, inasmuch as 34 & 35 Hen. 8, c. 20, prohibits in such case the tenant in tail, as long as a reversion or remainder subsists in the crown, from barring his own issue (Dy. 32; Pig. Recov. 84; 3 & 4 Will. 4, c. 74, s. 18); but if the remainder or reversion become vested in a private person, the tenant in tail might formerly by a common recovery (Pig. Recov. 88; 1 Prest. Convey. 18, 145), and may now, by a disentailing assurance (3 & 4 Will. 4, c. 74), acquire the fee simple.

And by the prerogative of the crown, independent of 34 & 35 Hen. 8, c. 20, other estates tail, not being granted as a reward or in consideration of services, subject to which the crown is entitled to the reversion, can only be barred so far as regards the issue and all subsequent limitations to subjects, and not so as to prejudice the rights of the crown. Pig. Recov. 86, 87; 1 Prest. Convey. 19, 146.

By 3 & 4 Will. 4, c. 74, s. 18, it is provided "that the power of

disposition thereinbefore contained shall not extend to tenants of estates tail, who, by an act passed in the thirty-fourth and thirty-fifth year of the reign of his majesty King Henry the Eighth, intituled 'An Act to imbar feigned Recovery of Lands wherein the King is in Reversion,' or by any other act, are restrained from barring their estates tail."

It seems, therefore, that estates tail expectant upon which the reversion is in the crown, and which were formerly protected by its prerogative, independent of statute, are not exempted from the operation of the act of 3 & 4 Will. 4, c. 74, and may therefore be now barred. Lewis, Perpet. 714.

It may be here mentioned, that the Courts will not allow a perpetuity to be created by a fraud upon the provisions of 34 & 35 Hen. 8, c. 20. Thus where lands were conveyed to the crown, with an intent that the crown should reconvey to the same person in tail, reserving the ultimate reversion to the crown, it was held that such an estate tail would not be within the protection of the statute. *Johnson d. Earl of Anglesea v. Earl of Derby*, Pig. Recov. 201; 2 Show. 104.

A conveyance of lands by the vendor of another estate to trustees upon trust for himself and his heirs until the purchaser of such other estate should be disturbed or damaged by reason of any incumbrance, with a trust by sale, demise or mortgage to raise sufficient to indemnify the purchaser against such incumbrance, will not be invalid as being within the rule against perpetuities. *Massy v. O'Dell*, 10 Ir. Ch. Rep. 22.

GRIFFITHS *v.* VERE.

Nov. 4, 9, 1803.

[REPORTED 9 VES. 127.]

TRUSTS FOR ACCUMULATION.]—*Trust by will for accumulation during a life, contrary to the statute 39 & 40 Geo. 3, c. 98, is good for twenty-one years by that statute.*

CHARLOTTE MATTHEWS by her will, dated the 6th of November, 1800, devised all her real estates to trustees, their heirs and assigns, upon trust to sell; and after certain legacies she gave all the rest of her monies, goods, chattels, credits, personal estate and effects whatsoever to the said trustees; directing them, as soon as conveniently may be after her decease, to get in her debts, and convert into specie such of her personal estate as should not be in specie, except articles specifically bequeathed; and further directed the trustees, &c., as soon as possible after paying her debts, funeral expenses and legacies, to invest the residue of the monies arising from the sale of her said real estates and from her personal estate in the public funds or real securities; upon trust, out of the dividends or interest, to pay to *Ann Townsend* an annuity of 10*l.* for her life; and to pay the residue of the said dividends, &c., to her sisters, *Elizabeth Mary Griffiths* and *Martha Vere*, during their joint lives, in equal proportions; and after the decease of either of them, the whole of the said dividends or interest to the survivor during her life; *provided*, and she declared her will, that so much of the said dividends or interest as shall accrue due to *Elizabeth Mary Griffiths* during the life of *John Griffiths*, her husband, shall not, during that time, be paid to her or to any person for her use; but the same shall be during his life invested by the trustees in the public funds or government or real securities; and that the dividends or interest which shall accrue thereon shall be added to and accumulated with the capital; and, upon the decease of the said

John Griffiths, the said capital, with the accumulations thereof, shall be forthwith transferred or paid to Elizabeth Mary Griffiths; and if she shall be then dead, the testator bequeathed the same to Martha Vere, if then living; and if not, then the same was to sink into the residue of her personal estate; and upon further trust, from and immediately after the decease of the survivor of Elizabeth Mary Griffiths and Martha Vere, to transfer the first-mentioned trust funds and the last-mentioned trust funds, with the accumulations thereof, in case the same shall have sunk into the residue of her personal estate, as aforesaid, to other persons.

Under the bill by Mrs. Griffiths and her husband, the accounts having been directed against the trustees, who were also executors, a petition was presented by the plaintiffs, praying a declaration that the proviso directing accumulation is contrary to the late act of parliament (*a*), and therefore null and void; and that the petitioners are entitled to have full benefit of the will, as fully as if such clause had not been inserted; and a transfer to the Accountant-General, &c.

A petition for the same purpose had been presented to the Master of the Rolls, and dismissed.

Mr. *Richards* and Mr. *Owen*, in support of the petition.—The meaning of this act is, that the whole attempt against which it is directed shall be void. It cannot therefore be good for a given time, the legislature having intimated nothing to that effect. A direction to accumulate for a life is a direction to accumulate for more than twenty-one years; a life estate being larger than an estate for years. The value of the life is of no importance; and the Court will not inquire into that. This act is to be construed by analogy to the law of executory devises, which are allowed only within certain limits. As the accumulation may, by possibility, last longer than twenty-one years, the disposition is void: as a limitation over of personal property after a disposition to a man and the heirs of his body is void; without regard to the possible event that they may be extinct within the period allowed by law. If the accumulation should, under the direction in the will, continue beyond the twenty-one years, what is to become of that which is accumulated after that period, and of the interest of the previous accumulation? This act has analogy to the

(*a*) Stat. 39 & 40 Geo. 3, c. 98.

act of *Hen. 8 (b)*. It is not material that the one is a restraining, the other an enabling, act; but the same construction must be put upon the same words, unless tending to defeat the general intention of the act.

Mr. *Romilly*, Mr. *Roupell* and Mr. *Trower*, for the other parties against the petition.—This case arises upon a restraining statute; restraining the legal right to dispose of property. It has no analogy to the statute of *Hen. 8*, which is an enabling statute. Neither has it analogy to executory devise. Upon the construction of this act it clearly was not intended to prevent accumulation, in any case, after the death of the party, up to the period of twenty-one years; and though an attempt is made to go beyond that, the purpose shall be good to that extent in whatever form it is directed; for no precise form of directing accumulation is prescribed, nor could that be intended; but it is sufficient, whatever the form, that it is not to exceed the period of twenty-one years. The direction, that so far as accumulation is directed contrary to the act, it shall be void, applies only to the excess. There will be certainly some difficulty, in the event of the parties living beyond the period of twenty-one years, to determine what shall become of the excess. But in this case, if Mrs. *Griffiths* survives that period, she will be entitled to the accumulation, provided she survives her husband, to whose death it is confined, and it is possible that he may live only two or three years.

LORD CHANCELLOR (*Lord Eldon*).—I will talk to the Master of the Rolls and some of the Judges upon this case. The question is, whether, where the intention appears to attempt to make an accumulation for more than the life by deed, or twenty-one years by will, the whole shall be void; or whether it shall take effect for the period during which the legislature meant it to be still lawful to direct accumulation. Previously to this act it was competent to a man to dispose of property by will, and I think the authorities go also to accumulation of rents and profits for a life or lives in being and twenty-one years, and a little more, meaning the time of gestation; and without considering whether that may be put at the beginning as well as the end of the period, the point is whether the legislature meant to apply

(b) Stat. 32 Hen. 8, c. 28.

the principle, long settled as to executory devise, that if limitations are directed which go beyond the period allowed, it is void for the whole, and it is not good for the time allowed by law; the party not having said that. As to estates for life and for years, when the law speaks of the one as larger than the other, it does not look to the quality of duration. Upon the direction of the act, that the rents and profits, so long as the same shall be directed to be accumulated contrary to the provisions of this act, shall go to such persons as would have been entitled, if such accumulation had not been directed, the question is, whether, if any part goes beyond the period in which it might be consistent with the act, it is void during the whole period of the accumulation directed, or for such time only during which it could not be lawfully directed according to the act. Upon that it is necessary to consider the point alluded to: that cases may arise as to what is to become, during the residue of the joint lives after the twenty-one years, of the fruit of the fund accumulated during the twenty-one years.

LORD CHANCELLOR (*Lord Eldon*).—This question turns upon the will and the act of parliament. I understand a petition to the same effect was presented to the Master of the Rolls, insisting, that by this will accumulation is prescribed beyond what is allowed by the act; and therefore the direction is wholly void; and that then the plaintiffs were, in right of Mrs. *Griffiths*, within the terms of the act the persons entitled to the rents and profits, as if no such clause for accumulation was in the will; and the Master of the Rolls was of opinion, that, upon the true construction of the act, the accumulation directed during the life of the husband, if not in fact going beyond twenty-one years, was good; and if it did in fact continue beyond that period, yet upon the true construction of the act the direction was good *pro tanto*; and during the period of twenty-one years the rents and profits are well directed to accumulate; leaving it to the law to determine what is to become of the rents and profits to accrue between the end of the twenty-one years and the expiration of the life; and of course to determine also, what is to become of the interest of the fund created by the accumulation permitted for the period of twenty-one years. This brings before me the consideration, whether that judgment is right.

We all know the origin of this act (39 & 40 Geo. 3, c. 98) (*c*).

(*c*) See *Thellusson v. Woodford*, 4 Ves. 227.

Previously, I conceive, the law upon this point to have stood in this way; that you might, by executory devise, prevent an estate from vesting during a life or lives in being, and twenty-one years, and a small portion of time—the period of gestation. In *Long v. Blackall* (d), the question first arose, whether that period could be allowed both at the beginning and the end; that is, whether a child *en ventre* could be considered a life in being, the *terminus à quo* the time was to run. Whether the law is according to that decision or not, it was quite a settled notion previously, that you might, by executory devise, prevent an estate vesting for a life or lives in being, and twenty-one years, with that small addition at the end of the life; subject to all question as to the inconvenience from the circumstance of selecting a great number of lives, which might be considered *sub judice*. But it was generally so understood, and it was always conceived that, for the period during which you could prevent the estate vesting, you might direct the rents and profits to accumulate.

Such being supposed to be the capacity which every testator and grantor had, this act passed; and I believe it was considerably altered from what it was when introduced in the House of Lords, having received alterations in both Houses which were not foreseen. But, I believe, the object of those who introduced it, and the idea of all was, that in general, if not in all cases, those rents and profits would have gone, not to persons claiming by disposition, but by the effect of the act striking out of the will the direction for accumulation, to those entitled by intestacy; for, if literally pursued, the testator might give his estate to a person, not to take till the expiration of twenty-one years after a life in being; and if he said nothing about accumulation, the rents and profits would be undisposed of; if he directed what the act authorizes him to direct, that for the first twenty-one years after his death there should be accumulation, at the end of that time there might be a very long period, during which the rents and profits would go to no one by the disposition, but in the case of real estate would belong to the heir; and in the case of personal estate, unless there was an express disposition of what was not before disposed of, to the next of kin.

The sort of case now before me was not, I believe, much in the contemplation of the legislature. It is material to attend to every word

(d) 3 Ves. 486, 487; 7 T. R. 100.

of the act; for the language is not very similar to any other act, with either enabling or restraining clauses. The phrase "partial accumulation" is rather expressive of the effect than of direction, but, considering the subsequent part, it must be construed what shall be directed to be accumulated. If the act stopped at the declaration, that it shall be null and void, the estate in the mean time would be considered as not given unless falling into the residuary devise; and therefore the rents and profits undisposed of must have gone to the heir. But the question is, whether the following words are not so explanatory of the former as to show in what sense the legislature used the words declaring that it should be null and void, and whether, taking the whole clause together, it was not meant only as far as by the subsequent words it is directed to be so considered. The words "so long," admit of two constructions: one, so long as the same, by the effect of the direction in the will, shall be capable of being accumulated beyond twenty-one years from the death; the other so long as the same shall be directed to be accumulated contrary to the provisions of the act: the accumulation being understood to be contrary to the act, if directed by the will for more than twenty-one years.

It was argued that the direction to accumulate for a life is a direction to accumulate for more than twenty-one years; as an estate for life is a larger estate. It was further argued, upon analogy to executory devise, viz. that if the disposition is such as may postpone the vesting for more than lives in being and twenty-one years, &c., that executory devise is not capable of being supported in law, because the estate may vest before that period runs out; and that is very well settled. It was very much discussed in the case upon Lord *Foley's Will* (*Foley v. Burnell*, 1 Bro. C. C. 274). It is insisted that by analogy this act is to be so construed. There is no doubt a life estate is a larger estate not with regard to duration as to time but as to the interest taken in it. As to the analogy between executory devise and the law to be considered laid down by this act, if the act itself does not prescribe what is to be the effect of the direction, the analogy may be resorted to in order to determine the effect: but, if the act has itself said what is to be the effect, you cannot, upon analogy, go farther than to apply it, as far as the directing words of the act will allow.

The statutes enabling and restraining as to leases have been alluded to; and the whole doctrine, beginning with the statute of 32 *Hen. 8*, c. 28,

is to be found in *Bacon's Abridgment* (e); which is understood to have been written by a very eminent person. The true principle, as there collected, seems to amount to this; that the intention, with reference to which the act and the expressions contained in it are used, must be considered; and in those cases in which particular terms, leases for lives or twenty-one years, are pointed out, it is in vain to say it is to be considered good under a statute which has said, if otherwise made, it shall be void to all intents. As to the act 32 *Hen. 8*, c. 28, it has been considered, particularly in *Smith v. Tinder* (f), that, those words not being contained in that act, a construction may be put upon it to make the lease good. That, therefore, goes no farther than that in the construction of this act you may consider upon the words what was the intention of the legislature, and how far that allows you to make good what is directed, regard being had to the terms in which the prohibition and the consequences of violating that prohibition are prescribed.

It is obvious that many cases upon the old law of executory devise and accumulation are not in any manner provided for by this act. I doubt whether the present case was thought of; for by this will the estate is given, not by executory devise but by creating a trust to pay the annual profits: and then follows the direction for accumulation. If that direction was struck out, it is contended that the effect is not, as in other cases, that those profits would be undisposed of; but that it must not be considered a gift *in præsentia*; and that the clause for accumulation does not prejudice their immediately entering into the enjoyment. If it was necessary to decide that question a good deal is to be said upon it; and it is not clear upon this will, that it could necessarily be made out that there was a gift *in præsentia*, if this direction was struck out of the will; for the whole must be taken together. But, supposing it not struck out, is the direction void altogether, because it is not a direction for accumulation during twenty-one years or less, but which may happen to operate during a period that may last longer; admitting also that it may operate as a direction for less in effect? The point is doubtful; but, upon the whole, that construction, which has been put upon this act, is the right one; and I am the rather led to that by the concurrence of opinion among those, to whose assistance

(e) *Bac. Abr.* tit. "Lease."(f) *Cro. Car.* 22.

I have resorted upon the first construction of an act of so much importance, who all agree that this is the proper construction.

The difficulty was put strongly, that supposing the life of the husband should happen to endure for more than twenty-one years, what is to become of the profits accumulated at the end of the twenty-one years? and it is well put in these terms upon this will. It is clear now, accumulation may be directed for twenty-one years where an executory devise is created as large as heretofore; and when therefore there may be a very long interval. The very same difficulty might occur upon a will precisely in the terms of the act, as upon this will. For instance, suppose the testator had an infant son, a year old, and a brother, and that he expressly directed accumulation for twenty-one years; and, subject to that, gave the estate to his eldest son; and after the decease of his eldest son, to the eldest son of his brother: suppose the will contained a direction, that the property so accumulated, under a direction admitted to be legal, should go to the person who, under those limitations, was to take the estate: it is clear, though the direction to accumulate is only for twenty-one years, yet, under the combined effect of the direction and the law, there might be an accumulation for forty years; for if the son lived till just about the end of the first twenty years, and then died, and the brother had a son a week old, and by his will he had provided a maintenance for his own son, under the direction of the law that accumulation, 4,000*l.* for instance, must, during the minority of that son, accumulate in this Court. It is clear then he would take the accumulation of forty years, though the legislature did not mean that; and there would be no difficulty, consistently with the principle which is to result from this decision, in deciding that, whenever it arises. I could put many cases, in which the same difficulty would occur, if the direction for accumulation was in the very terms of this will.

Under these circumstances, finding the Master of the Rolls' opinion to be such as I have stated, and that it has the concurrence of those whom I have consulted, it would be enough for me, if it was only the inclination of my own opinion, to say, this is the right construction.

Petition dismissed.

Griffiths v. Vere is usually cited as a leading case on the construction to be put upon 39 & 40 Geo. 3, c. 98, commonly called the Thellusson Act; and the dicta as well as the decision of Lord Eldon in that case have been adopted by subsequent Judges.

Previous to the passing of that act, as is laid down by Lord Eldon in the principal case, the accumulation of the income of property, and the suspension of all enjoyment of it, might have been directed for the same period as the suspension of its alienation or vesting, viz. for a life or lives in being and twenty-one years after, the rule against perpetuities being the only rule against accumulation. See *Cadell v. Palmer*, ante, p. 424.

The inconvenience, however, of the rule with reference to accumulations does not appear to have presented itself to the test of public opinion, until Mr. *Thellusson*, by his much litigated and extraordinary will, vested the bulk of his large properties in trustees, with directions to accumulate the income during the lives of his sons and of any of their descendants living at the time of his decease or born in due time afterwards. See *Thellusson v. Woodford*, 4 Ves. 112, where after long and elaborate arguments on both sides, amongst which that of Mr. Hargreave is well worthy of perusal, Lord Rosslyn, assisted by Lord Alvanley, M. R., Buller, J., and Lawrence, J., held the direction to accumulate valid, and upon appeal to the House of Lords the decision was affirmed. (See 11 Ves. 112.)

It is clear, indeed, that an additional period of twenty-one years from the death of the survivor of Mr. Thellusson's descendants might have been legally added without violating the law as it then stood, as accumulation would then only have been directed for a life or lives in being and twenty-one years after.

The result of this decision was the passing of the Thellusson Act (39 & 40 Geo. 3, c. 98), whereby, after reciting that it was expedient that all dispositions of real or personal estates, whereby the profits and produce thereof were directed to be accumulated, and the beneficial enjoyment thereof was postponed, should be made subject to the restrictions thereafter contained, enacted, "that no person shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term *than the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor, settlor, devisor or testator, or during the minority or respective minorities of any person or persons who shall be living or en ventre sa mère at the time of the death of such grantor, devisor or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will or other assurances directing such accu-*

mulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." Sect. 1.

Sect. 2 provides, "that nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor or deviser, or any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this act had not passed."

The act was not to extend to heritable property in Scotland (s. 3; and see *Macpherson v. Stewart*, 28 L. J., Ch. 177), nor to wills made before the act, unless the testator should be living and of sound mind for twelve calendar months from its passing. Sect. 4.

The third section, however, of the

act has been repealed by 11 & 12 Vict. c. 36, s. 41, which enacts that the act "shall in future apply to heritable property in Scotland."

Applicability of the Act.

Where the direction to accumulate is within the limits of the rule against perpetuities, but exceeds any of the periods allowed by the act for accumulation, it will, as was laid down in the principal case, be void only for the excess. Thus, if accumulation be directed until a legatee, then unborn, attains twenty-one, the accumulation is good for twenty-one years (*Longdon v. Simson*, 12 Ves. 295); or if accumulation were directed for a life (ante, p. 497) or twenty-four years, it would be good for twenty-one. *Ib.*; *Re Lady Rosslyn's Trust*, 16 Sim. 391.

Where, however, there is a direction for accumulation beyond the limits of the rule against perpetuities, i. e. for a period which might possibly exceed a life or lives in being and twenty-one years after, it will be wholly void after as it would have been before the act. *Boughton v. Jamcs*, 1 Coll. 26, 45; see *Browne v. Stoughton*, 14 Sim. 369; *Lord Southampton v. The Marquis of Hertford*, 2 V. & B. 54; *Marshall v. Holloway*, 2 Swanst. 432; *Curtis v. Lukin*, 5 Beav. 147; *S. C.* on appeal, 1 H. L. Ca. 406; *Scarisbrick v. Skelmersdale*, 17 Sim. 187; *Turvin v. Newcome*, 3 K. & J. 16.

In favour of a charity, however, the Court of Chancery will, by means of the doctrine of cy près, effectuate the general intention, although the direction to accumulate may be held void. *Martin v.*

Margham, 14 Sim. 230; see also *Attorney-General v. Poulden*, 3 Hare, 555.

The provisions of the first section of the act are applicable, not only where accumulation in express terms, or substantially though in other words, is directed (*Shaw v. Rhodes*, 1 My. & Cr. 135; *S. C. Dom. Proc.*, nom. *Evans v. Hellier*, 5 C. & F. 114; *Mathews v. Keble*, 4 L. R., Eq. 467; 3 L. R., Ch. App. 691), but also where a direction to accumulate is implied, as where a contingent executory bequest is made which is liable to be divested by the birth of issue, and accumulation, were it not forbidden by the act, must necessarily take place, until the contingency should be determined. Thus in *Macdonald v. Bryce*, 2 Keen, 276, where the testator gave the residue of his property to the eldest son of A., and failing him to the next and other sons of A., and failing the male children of A. to certain legatees named in the residuary clause; and he directed his executors to apply the dividends of his residuary property to the maintenance of the eldest son of A. during his minority, and of the other sons in succession of A. in case of his eldest son dying before attaining the age of twenty-one. A.'s eldest son survived the testator, and died an infant, and A. had no other son, and he and his wife were of a very advanced age. The period allowed by the statute for accumulation having expired, it was held by Lord Langdale M. R., that although accumulation was not expressly directed, the case came within the act, and that the

income of the residue after the time thereby allowed for accumulation had expired, until the contingency upon which the residue was given, either to a son of A. or the legatees, should be determined, belonged to the next of kin. See also *Evans v. Hellier*, 5 C. & F. 114; *S. C. nom. Shaw v. Rhodes*, 1 My. & C. 135; *Morgan v. Morgan*, 4 De G. & Sm. 164; *Tench v. Cheese*, 6 De G., M. & G. 453, reversing *S. C.* 19 Beav. 3; *Countess of Bective v. Hodgson*, 10 H. L. Ca. 156; *Wade-Gery v. Handley*, 1 Ch. D. 653, overruling the remarks of Sir L. Shadwell, V. C., in *Elborne v. Goode*, 14 Sim. 174; *Ralph v. Carrick*, 5 Ch. D. 984.

These decisions do not appear to conflict with the hypothetical case put by Lord Eldon (ante, p. 504), inasmuch as in that case the accumulation is assumed to take place after the time allowed by the act, accidentally and as incident to management, and not in accordance with the express or implied direction of the testator.

Where however property is directed to be applied immediately for particular purposes, but owing to the neglect of trustees, or for some other reason, it is accumulated, the act will not be applicable. *Lombe v. Stoughton*, 12 Sim. 304; see also *Phipps v. Kelynge*, 2 V. & B. 57.

The concluding words of the Thellusson Act, sect. 1, must be construed to mean "if such excessive accumulation had not been directed." *Green v. Gascoyne*, 4 De G., Jo. & Sm. 565.

A disposition will come within the act where accumulation is directed

beyond the time allowed, although the objects of the gift may have a vested interest capable of alienation (*Shaw v. Rhodes*, 1 My. & Cr. 135; and see *Oddie v. Brown*, 4 De G. & J. 179). And where accumulations at simple as well as at compound interest are directed. *Shaw v. Rhodes*, 1 My. & Cr. 135; and see *S. C.* 5 C. & F. 114, nom. *Evans v. Hellier*.

As the Thellusson Act passed shortly before the union, it is not applicable to *real* estate in Ireland or the rents arising therefrom (*Ellis v. Maxwell*, 12 Beav. 104, 111). The income, however, arising from the rents will be considered as a portion of the capital or personal estate received from year to year, which cannot be allowed to accumulate under the statute. *Ib.* 111.

Nor, it seems, will the act apply in the case of a fund settled by a domiciled Irishman in an Irish settlement on the marriage of his daughter, though the intended husband was a domiciled Englishman. *Heywood v. Heywood*, 29 Beav. 9.

But it does apply to leaseholds in England disposed of by the will of a testator, domiciled in Ireland, because leaseholds being immovables are governed by the *lex loci rei sitæ*. *Freke v. Lord Carbury*, 16 L. R., Eq. 461.

As to the Periods for which Accumulation may be directed under the Act.

Upon reading the act it will be observed, that there are *four* periods during which accumulation may be directed:—

First, for the life or lives of

any grantor or grantors, settlor or settlers. See 2 Prest. Ab. 180.

Second, for the term of twenty-one years, from the death of any such grantor, settlor, deviser or testator. *Bengough v. Edridge*, 1 Sim. 173; *Lewes v. Lewes*, 6 Sim. 304; *Scott v. Earl of Scarborough*, 1 Beav. 154; *Gorst v. Lowndes*, 11 Sim. 434.

Third, during the minority or respective minorities of any person or persons, who shall be living, or *en ventre sa mère*, at the time of the death of such grantor, deviser or testator. *Johnson v. Johnson*, 1 Keen, 648; *Harrison v. Harrison*, *Ib.* 765; *Kime v. Welfitt*, 3 Sim. 533; *Arnott v. Bleasdale*, 4 Sim. 387; *Hulme v. Hulme*, 9 Sim. 644; *Easum v. Appleford*, 10 Sim. 274.

Fourth, during the minority or respective minorities only of any person or persons, who, under the uses or trusts of the deed, surrender, will or other assurances, directing such accumulation, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated. *Haley v. Bannister*, 4 Madd. 275; *Ellis v. Maxwell*, 3 Beav. 549; *Bryan v. Collins*, 16 Beav. 14, 17; see *Wade-Gery v. Handley*, 1 Ch. D. 653, and cases there cited; *Sidney v. Wilmer*, 4 De G., Jo. & Sm. 84.

Accumulation will only be allowed for *one* of the periods permitted by the act. Thus, in the case of *Wilson v. Wilson*, 1 Sim., N. S. 288, where there was a direction to accumulate the income of trust funds for twenty-one years after the testa-

tor's death, and, at the expiration of that term, during the minorities of the persons entitled under the trusts, it was held by Lord Cranworth, V. C., that the accumulation was only good for the twenty-one years.

And the same construction must be put upon the act, when the accumulation is directed by a deed as by a will. *Lady Rosslyn's Trust*, 16 Sim. 391.

A direction by will to pay out of the testator's property the premiums upon a policy of insurance, effected by the testator upon the life of another person, is valid for the whole life insured, and is not an accumulation by the Thellusson Act (39 & 40 Geo. 3, c. 98) restricted to twenty-one years only. *Bassil v. Lister*, 9 Hare, 177. See, however, 1 Jarm. Wills. 294, 3rd ed.

How far Accumulations are void under the first Section of the Act.

It was argued in the principal case, that the act was to be construed by analogy to the law of executory devises, which are allowed only within certain limits. That as the accumulation might by *possibility* last longer than twenty-one years the disposition was altogether void; as a limitation over of personal property after a disposition to a man and the heirs of his body is void, without regard to the *possible* event, that they might be extinct within the period allowed by the law. Lord Eldon, however, did not consider that there was any analogy between the law as to executory devises, and the law laid down by the act; in effect that a trust for accu-

mulation, not exceeding the limits allowed to an executory devise, but beyond the limits allowed by the act, is void, not wholly but only *pro tanto*. The distinction is forcibly put by Lord Eldon in a subsequent case. "The true doctrine," says his Lordship, "seems to be, that of a trust for accumulation, which, prior to Lord Loughborough's Act, would have been good, so much as is now within the act will be good, but the excess will be bad; but if there be a trust for accumulation, and part of it would have been bad before the act, that part remains bad notwithstanding the act." *Marshall v. Holloway*, 2 Swanst. 450; and see *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54; *Crawley v. Crawley*, 7 Sim. 427; *Pride v. Fooks*, 2 Beav. 430; *Miles v. Dyer*, 8 Sim. 330; *O'Neil v. Lucas*, 2 Keen, 313; *Eyre v. Marsden*, Ib. 564; *Williams v. Nixon*, 2 Beav. 472; *Blease v. Burgh*, Ib. 221; *Ellis v. Maxwell*, 3 Beav. 587; *Shaw v. Rhodes*, 1 My. & Cr. 135; *Williams v. Lewis*, 5 Jur., N. S. 323; *Oddie v. Brown*, 4 De G. & J. 179.

Upon this principle, as the words of the act allowing accumulation during the minority of a person have been held to mean the minority of a person *in esse*, a direction to accumulate during the minority of a person *unborn at the death of the testator* has been held to authorize accumulation for twenty-one years from the death of the testator, and to be void beyond that period. See *Longdon v. Simson*, 12 Ves. 295, there accumulation was directed until legatees not then born attained twenty-one; Sir W. Grant,

M. R., held the direction to accumulate good for twenty-one years from the testator's death, but void for the excess beyond that period. "Suppose," said his Honor, "instead of a life, with regard to which there might be some uncertainty, the testator had said, the accumulation should continue twenty-four years, it would be good for twenty-one years." See also *Haley v. Bannister*, 4 Madd. 275; and see *Ellis v. Maxwell*, 3 Beav. 596, where Lord Langdale, M. R., said that the act "did not appear to permit accumulation during a minority and any time to elapse between the death of the testator and the commencement of the minority;" but he agreed with Sir W. Grant that in such a case accumulation for twenty-one years might take place.

The period of twenty-one years is calculated from the death of the testator, excluding the day of his death. Thus, where a testator directed that the income of his property should be accumulated for the term of twenty-one years *from* his death, and died on the 5th of January, 1820, it was held by Sir L. Shadwell, V. C., that in the computation of the term the day of his death was to be excluded, and consequently that dividends which became due on the 5th of January, 1841, were subject to the trust for accumulation. *Gorst v. Lowndes*, 11 Sim. 434.

Although, according to the directions of a testator, accumulations are not to commence for many years after his death, as, for instance, upon the death of a tenant for

life or annuitant, the accumulation nevertheless under the act must cease at the expiration of twenty-one years from the testator's death. *Webb v. Webb*, 2 Beav. 493; *Shaw v. Rhodes*, 1 M. & C. 154; *Att.-Gen. v. Poulden*, 3 Hare, 555; *Nettleton v. Stephenson*, 3 De G. & S. 366.

Where trustees are directed to accumulate rents for twenty-one years from the testator's death, although the half-year's or quarter's rent does not fall due until after the expiration of the term, it will be apportionable without any violation of the Thellusson Act, and that portion of the rent which is apportioned to the period falling within the twenty-one years will belong to the persons entitled to the benefit of the term. *St. Aubyn v. St. Aubyn*, 1 Drew. & Sm. 611.

Although any direction to accumulate after the legal period will be considered as struck out of the instrument, other directions, though operating upon the property out of which the accumulations are directed to proceed, will be good. Thus, in *Pride v. Fooks*, 2 Beav. 430, where property was directed to be accumulated for such children as a certain person should have at his death, with power to the trustee to apply such part of the income as in his judgment might be proper for their education and maintenance during their minority, and for their future advancement in life, it was held by Lord Langdale, M. R., that although the period for accumulation under the act had expired, the power of maintenance and advancement still continued. "The act," said his Lordship, "which prevents accumu-

lations applies only to that which was meant to be accumulated,—to the residue after the purposes which continue lawful are answered; not to anything which it was within the duty or the legal competence of the trustee to do, as against the accumulation, if the accumulation had been allowed to proceed; a great difference is indeed effected in the parties who are interested to oppose any application of the income which would otherwise have accumulated, but no difference in the power or duty to apply the income in a mode directed by the will, which continues lawful.” See *Eyre v. Marsden*, 2 Keen, 574; *Ellis v. Maxwell*, 3 Beav. 587.

Where there is a direction that accumulation is to take place until the children of certain persons born during the life of the testator shall attain twenty-one, a child en ventre sa mère will not be included among the number of such children for the purpose of postponing the period of distribution. *Blasson v. Blasson*, 2 De G., Jo. & Sm. 665.

As to the Persons entitled to the Income which according to the Statute cannot be accumulated.

The statute enacts, “that the produce of the property, so long as the same shall be directed to be accumulated contrary to the provisions of the act, shall go and be received by such person or persons as would have been entitled thereto, *if such accumulation had not been directed.*” Sect. 1.

This enactment was not intended to operate, and does not operate, to alter any disposition made by the

donor, except the direction to accumulate. Striking out that, everything else is left as before, and all the other directions as to the time of payment, substitution or any contingencies, are to take effect according to the true construction of the instrument by which accumulation is directed, unaltered by the effect of the statute. *Eyre v. Marsden*, 2 Keen, 574.

Where the income of real estate is directed to be accumulated, and there is no residuary devise, or even, before 1 Vict. c. 26, although there was a residuary devise, the subsequent limitations will not be accelerated, but the excess of accumulations will result to the heir at law. *Eyre v. Marsden*, 2 Keen, 564; *Nettleton v. Stephenson*, 3 De G. & Sm. 366; *Edwards v. Tuck*, 3 De G., Mac. & G. 40; *Re Drakeley's Estate*, 19 Beav. 395; *Green v. Gascoigne*, 4 De G., Jo. & Sm. 565; *Talbot v. Jevers*, 20 L. R., Eq. 255.

In the event, however, of the excess of accumulation of real estate being a chattel interest, although it will go to the heir, nevertheless upon his death it will devolve upon his personal representatives. Thus, in *Sewell v. Denny*, 10 Beav. 315, where a testator devised his real estate to trustees in fee to accumulate until the youngest child of his niece attained twenty-one, and then to divide it. After the expiration of twenty-one years, and before the youngest child attained twenty-one, the heir of the testator died. Lord Langdale, M. R., in giving judgment, said, “The act requires you to strike out of the will the excess of accumulation; and the conse-

quence is, that the heir-at-law of the testator takes, as undisposed of, the rents accruing beyond the time allowed and until the youngest child attains twenty-one. But I am of opinion that this was but a limited and chattel interest, which on the death of the heir-at-law passed to her personal representative."

If the interest which came to the heir in such case was an estate pur autre vie, on his death previous to 1 Vict. c. 26, it would go to his heir (*Barrett v. Buck*, 12 Jur. 771; *Halford v. Stains*, 16 Sim. 488); on his death subsequent to that act, to his personal representatives. 1 Vict. c. 26, s. 6.

In wills, however, coming within the operation of the New Wills Act, 1 Vict. c. 26, the void accumulations directed to be made out of real estate, not comprised in a residuary devise, will fall into the residuary devise, if there be one, unless a contrary intention appear on the face of the will.

Where *personal estate*, not being the residue, is directed to be accumulated, and there is a residuary bequest, the excess of accumulation beyond the period allowed by the act will fall into the residue (*Haley v. Bannister*, 4 Madd. 275; *O'Neill v. Lucas*, 2 Keen, 313; *Webb v. Webb*, 2 Beav. 493; *Re Drakeley's Estate*, 19 Beav. 395; *Attorney-General v. Poulden*, 3 Hare, 555; *Jones v. Maggs*, 9 Hare, 605), and will form part of the capital. *Crawley v. Crawley*, 7 Sim. 427.

Where the income of a residue is directed to be accumulated, when the period allowed by the act for accumulation has expired, it will

go not to the residuary legatee in case it arises from personal property but to the next of kin of the testator (*McDonald v. Bryce*, 2 Keen, 276; *Pride v. Fooks*, 2 Beav. 430; *Elborne v. Goode*, 14 Sim. 165; *Wilson v. Wilson*, 1 Sim., N. S. 288; *Bourne v. Buckton*, 2 Sim., N. S. 91; *Oddie v. Brown*, 4 De Gex & Jo. 179; *Mathews v. Keble*, 4 L. R., Eq. 467; 3 L. R., Ch. App. 691; *Simmons v. Pitt*, 8 L. R., Ch. App. 978; *Talbot v. Jevvers*, 20 L. R., Eq. 255; *Weatherall v. Thornburgh*, 8 Ch. D. 261), in case it arises from real property to his heir-at-law (*Halford v. Stains*, 16 Sim. 488; *Wildes v. Davies*, 1 Sm. & Giff. 475), and in case it arises from a mixed fund, then to the heir-at-law and next of kin respectively, according to the nature of the fund by which it is produced. *Eyre v. Marsden*, 2 Keen, 564; 4 My. & Cr. 231; *Edwards v. Tuck*, 3 De G., M. & G. 40; *Burt v. Sturt*, 10 Hare, 415; *Talbot v. Jevvers*, 20 L. R., Eq. 255; *Ralph v. Carrick*, 5 Ch. D. 984.

Where an estate is devised *subject to a charge* which is directed to be accumulated, the excess beyond the period allowed by the act will sink for the benefit of the devisees or successive devisees. *In re Clulow's Trust*, 1 J. & H. 639; *Evans v. Hellier*, 1 My. & Cr. 135; 5 C. & F. 114.

But where a testator directs a sum charged upon an estate to form part of his residuary estate, and directs the residue to be invested in the purchase of land, the rents of which were to be accumulated, the excess of accumulation beyond what

is allowed by the Act, will not sink into the estate, on which the sum was charged, or go to the testator's heir, but will go to his next of kin. Thus in *Simmons v. Pitt*, 8 L. R., Ch. App. 978, a testator having power to charge real estates, did by deed charge them with the payment, after the deaths of himself and his wife, of 6,000*l.* and interest, to trustees upon such trusts as he should by will appoint. By his will he directed that the 6,000*l.* and interest should form part of his residuary personal estate, and directed the residue to be invested in the purchase of land, of which the trustees were to accumulate the rents in a manner which in part was void under the Thellusson Act. It was held by the Lords' Justices, affirming the decision of Lord Romilly, M. R., that that part of the interest as to which the directions to accumulate were void went to the next of kin of the testator, and did not sink into the estates on which it was charged or go to his heir.

Where there is an absolute bequest of property to a legatee, which is subsequently modified by a direction to accumulate the income thereof for a period beyond that allowed by the Act, the accumulation in excess of that thereby allowed will belong to the legatee, as being the person who would have been entitled thereto if such accumulation had not been directed. See *Coombe v. Hughes*, 2 De G., J. & S. 657. There a testator bequeathed his residuary estate to his two sons and his daughter in equal shares. He then directed that the

shares of his sons should be paid to them as soon as convenient, and directed that his daughter's share should not be paid to her, but that the income should be accumulated during the life of her husband, and, upon the death of her husband, should there be any child or children living, the property should be secured for their benefit and that of their mother; but should there be no child or children living, then the share might be paid to her for her own use and benefit, but if she died before her share became payable, then he directed it to be held in trust for his two sons. The husband was still living at the expiration of twenty-one years from the death of the testator. It was held by the Lords Justices, affirming the decision of Sir John Romilly, M. R. (reported 34 Beav. 127), that the direction to accumulate becoming void at the end of twenty-one years from the testator's death, his daughter was entitled absolutely to the subsequent income until the death of her husband. "The husband," said Lord Justice Turner, "having outlived the period allowed by law for the accumulation of income, to whom is the income to go? It appears to me, that there having been an absolute gift in the first instance, that gift takes in so much of the income as is not effectually disposed of by the subsequent limitations. The effect of the Statute is, that so far as a trust for accumulation is invalidated by it, the income goes to the persons who would have been entitled to it had there been no trust for accumulation. Who, in the present

case, would have been so entitled? We may try this by supposing that no accumulation had been directed during the life of the husband. We have, then, trusts declared which arise only on the death of the husband, with an absence of any declaration of trusts during his life, and in that case the original gift remaining unmodified, so far as regarded the income arising during the husband's life, the whole of that income would have gone under the original gift. So, here, the direction to accumulate being void after the twenty-one years, the income, after that period, goes according to that gift."

So likewise, in *Trickey v. Trickey*, 3 My. & K. 560, a testator bequeathed the residue of his personal estate in trust for his daughter for her life, and after her decease for her child or children, and on failure of children for other relatives; and there was a proviso that in case the income of his residuary estate exceeded 200*l.*, the surplus should accumulate for the benefit of the child or children of the daughter, and on failure thereof, for the other relatives before named. The daughter lived for twenty-six years after the death of the testator. Lord Langdale, M. R., held that the accumulations of the income exceeding the annual sum of 200*l.* were good for twenty-one years. That the daughter during the rest of her life was entitled to the interest of the accumulated fund, which after her death passed by the limitation. And the accumulation having ceased at the end of the twenty-one years, from that time, during her life, the daughter was

entitled to the whole sum beyond the 200*l.*, being the person who would have been entitled if such accumulation had not been directed.

First Exception as to Provisions for Payment of Debts.

With regard to the construction to be put upon the second section of the act, viz. "that nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor or deviser, or other person or persons," it has been laid down by Lord St. Leonards, C., in *Barrington v. Liddel*, 2 De G., M. & G. 480, 496, reversing the decision of Sir G. Turner, V. C., that "the legislature then meant, that a man should, within the limit allowed by law (*i.e.* the rule against perpetuities), be able to provide not only for his own debts but for the debts of such other persons as he should think fit, it being perfectly certain that the power was one which it would not be very dangerous to intrust to anybody. It is clear, also, that the provision as to debts must relate to past debts, and nobody can deny that, a man being able by his will under this act to provide for his debts generally, this will include his future debts." See also *Bateman v. Hotchkiss*, 10 Beav. 426.

The provision for payment of debts excepted from the act, is not confined to debts existing at the date of the will or at the death of the testator, but extends to any indemnity fund to be accumulated for the purpose of meeting future liabilities. See *Varlo v. Faden*, 27 Beav. 255; 1 De G., F. & J. 211.

Such direction, however, for the accumulation of an indemnity fund must be *bonâ fide*, and not merely colorable for the purpose of evading the act (*Varlo v. Faden*, 27 Beav. 265, per Sir J. Romilly, M. R.); and if it be not the evident intention of the testator that the debts should at all events be paid, and not merely accidentally or upon contingencies which may or may not happen, the case will not come within this exception. *Mathews v. Keble*, 3 L. R., Ch. App. 691; 4 L. R., Eq. 467.

Although a direction, not limited in point of time, for the payment of debts charged upon an estate is valid, nevertheless if part of the estate so charged is sold at the instance of creditors or otherwise, and the proceeds applied in payment of debts, the Court cannot, after the debts are paid off, direct an accumulation of the rents to go on until there shall have been brought together a fund equal to the value of the property sold. See *Tewart v. Lawson*, 18 L. R., Eq. 490.

Second Exception in favour of Portions.

The word "portions" in the second section will be construed as extending to "portions" existing independently of the instrument directing the accumulation (*Barrington v. Liddell*, 2 De Gex, Mac. & Gord. 480; *Middleton v. Losh*, 1 Sm. & Giff. 61), and also to portions created by it. *Bourne v. Buckton*, 2 Sim., N. S. 96; *Barrington v. Liddell*, 2 De G., Mac. & G. 498; *Beech v. Lord St. Vincent*, 3 De G. & Sm. 678; overruling *Halford v. Staines*, 16 Sim. 488.

With regard to what should be deemed portions within the meaning of the act, it has been well observed by a learned judge, that "there is no reason for putting a strained interpretation upon the expression 'portions for children' used therein, as it would be contrary to the policy of the act to do so, and would afford a ready means of escaping from its provisions." Per Turner, V. C., in *Jones v. Maggs*, 9 Hare, 607.

Portions for children, however, are generally understood to be sums of money secured to them *out of property springing from or settled upon their parents*. Hence, where a parent takes an estate out of which a provision is made for the children, such provision will be a portion within the meaning of the exception in the act. Thus in *Beech v. Lord St. Vincent*, 3 De G. & Sm. 678, the testator devised estates to trustees for ninety-nine years, upon trust to raise *during so much of the life of his only son* as should fall within twenty-one years from the testator's death, and also *during such time of his son's life* as there should be in existence any younger children or child of his son, an annuity or yearly sum of 2,000*l.*, and to invest and accumulate such sum, and to stand possessed of the same and of the accumulations thereof, upon certain trusts thereby declared in favour of the *son's* younger children; and, subject to the term, the estates were devised to the use of the son for life, with remainder to the use of his first and other sons successively in tail, with remainders over. It was held by Sir J. L. Knight

Bruce, V. C., that the trust for accumulation came within the exception of the second section, as being a provision "for raising portions" for the child or children of the son who took an interest under the devise, and that such trust was valid *independently* of the act, it being confined to a life in esse; viz., that of the testator's son.

There may, no doubt, be cases in which provisions for the children out of property in which the parents take no interest, may well be called portions; but they would only receive that designation where the nature or context of the instrument gave them that character. Per Turner, V. C., in *Jones v. Maggs*, 9 Hare, 607.

Where there is a gift to children both of capital and income, not made or secured to them out of property springing from or settled upon their parents, and there is nothing in the nature or context of the instrument to impress upon the gift the character of a portion, it would not be called a portion in the ordinary sense of the word, nor ought to be so considered within the meaning of the act of parliament. Thus in *Jones v. Maggs*, 9 Hare, 605, the testatrix gave to trustees the residuary estate, upon trust to invest 200*l.* in 4*l.* per cent. annuities, and to accumulate the dividends until the youngest child of her brother should attain twenty-one, on which event it was to be divisible among her brother's children; and the testatrix gave the residue, after the investment of the 200*l.*, to her brother. It was held by Sir George Turner, V. C., that the 200*l.* given by the testatrix was not a "portion"

within the meaning of the second section, and that the accumulation was therefore void after the expiration of twenty-one years, as not coming within the protection of that section. "In the present case," said his Honor, "*the whole of the 200*l.*, with all the accumulations upon it*, is given to the children; and there is clearly nothing in the nature of the instrument, by which the gift is made, to impress upon it the character of a portion.

"It was said, however, that the context of the will impressed that character upon the gift, as the residue is given to the parent, and the legacy would be a deduction from the residue; but when it is said that the legacy is a deduction from the residue, it is so in no other sense than that the residue would be greater if the legacy was not given. The legacy is given out of the general estate, and not out of the residue, and if this legacy is to be construed to be a portion, every legacy given to a child of a residuary legatee must, as it seems to me, be so construed, and thus the act be wholly defeated." See also *Eyre v. Marsden*, 2 Keen, 564; *Bourne v. Buckton*, 2 Sim., N. S. 91.

A direction to accumulate *all* a person's property, or even the *residue* (after certain specific devises or bequests), for the benefit either of one or all the children of a family, is not a provision for raising portions within the meaning of the second section. See *Eyre v. Marsden*, 2 Keen, 564; *Bourne v. Buckton*, 2 Sim., N. S. 91; *Wildes v. Davies*, 1 Sm. & Giff. 475; *Burt v. Sturt*, 10 Hare, 415; *Edwards*

v. *Tuck*, 3 De G., M. & G. 40. See the observations of Bosanquet, J., in *Shaw v. Rhodes*, 1 My. & Cr. 154; *S. C.* 5 C. & F. 114, nom. *Evans v. Hellier*; *Mathews v. Keble*, 3 L. R., Ch. App. 691, 696, 697; 4 L. R., Eq. 467.

A direction, moreover, that a fund should be accumulated and given to such children as may be living when the accumulations are to cease will not make it a portion within the exception. See *Burt v. Short*, 10 Hare, 415. In *Drewett v. Pollard*, 27 Beav. 196, a testator gave a sum of stock producing 180*l.* per annum, in trust to pay life annuities of 20*l.* each to seven persons, and at the decease of any, to accumulate his annuity, and after the decease of the last annuitant, to divide the stock and accumulations amongst the surviving children of the annuitants. It was held by Sir J. Romilly, M. R., that the case did not come within the exceptions of *portions*, for *children* of persons take an interest under the will, and that consequently the trust for accumulation beyond twenty-one years after the testator's death was void.

Nor is a direction that a fund should be accumulated and given to a parent for life, with remainder to her children, a direction for raising portions within the meaning of the act. See *Watt v. Wood*, 2 Drew. & Sm. 56; 31 L. J., N. S., Ch. 339. There a testator bequeathed a sum of money to trustees to be invested, and the interest to be accumulated during the life of A. B., upon whose death the capital and the accumulations were to be held in trust for the benefit of the wife of A. B. and

her younger children. It was held by Sir R. T. Kindersley, V. C., that this was not a bequest for the purpose of raising portions for younger children within the meaning of the second section of the Act, and, therefore, that the parties entitled under it, could only claim the accumulations for twenty-one years from the death of the testator.

A direction in a will to accumulate rents and profits of an estate, up to a sum certain, for portions of the children of a devisee, who dies without having had any child, is not within the protection of the second section of the Act. *In re Chulow's Trust*, 1 J. & H. 639.

It may be here mentioned that parties who are entitled to a vested interest in funds can, when adult, have the accumulations stopped, and demand the immediate payment of such funds to themselves (*Coventry v. Coventry*, 2 Drew. & Sm. 470; *Gosling v. Gosling*, Johns. 263; see vide *Talbot v. Jevers*, 20 L. R., Eq. 255). But this will not be the case where the bequest is to a charity. *Harbin v. Masterman*, 12 L. R., Eq. 559.

The words "child or children," in the second section of the Act, are not to be confined to children born at the time the instrument creating the trust for accumulation came into operation, but may be extended to children thereafter to come into existence. *Beech v. Lord St. Vincent*, 3 De G. & Sm. 685.

It is perfectly clear, that whatever a grantor or settlor may do with regard to his *own children*, he may do with regard to the *children*

of any other person as to past portions or future portions; because there is no distinction between them (*Barrington v. Liddell*, 2 De G., M. & G. 499), except that the persons whose children may have portions provided for them by a grantor, settlor or deviser must be persons who take an interest under "such conveyance, settlement or devise." *Ib.*; *Eyre v. Marsden*, 2 Keen, 564; *St. Paul v. Heath*, 13 L. J., N. S. 271.

Much discussion has arisen upon the subject, what is "an interest" under a conveyance, settlement or devise within the meaning of the second section, so as to bring a provision for raising portions for any child or children of such person within the meaning of such section.

It seems that, however small may be the sum which is given to the parent of children for whom portions are provided, it is an interest within the meaning of the Act, and that it is not necessary that it should arise from the property to be accumulated. *Evans v. Hellier*, 5 C. & F. 126; see also *Barrington v. Liddell*, 2 De G., M. & G. 505, reversing the decision of Sir G. Turner, V. C., 10 Hare, 429; *Burt v. Sturt*, 10 Hare, 415; *Edwards v. Tuck*, 3 De G., M. & G. 505; see also *Eyre v. Marsden*, 2 Keen, 564; *Shaw v. Rhodes*, 1 My. & Cr. 135; *Morgan v. Morgan*, 4 De G. & Sm. 164; *Barrington v. Liddell*, 10 Hare, 429; *Bourne v. Buckton*, 2 Sim., N. S. 100, 101; *Drewett v. Pollard*, 27 Beav. 196.

Nor is it necessary that the interest under the conveyance, settle-

ment or devise should be given in the very clause which creates the portion (*Barrington v. Liddell*, 2 De G., M. & G. 500; *Edwards v. Tuck*, 3 De G., M. & G. 40), or exist in the fund to be accumulated. *Burt v. Sturt*, 10 Hare, 415, overruling *Bourne v. Buckton*, 2 Sim., N. S. 91, 101; *Morgan v. Morgan*, 4 De G. & Sm. 164.

Third Exception as to Produce of Timber or Wood.

By the third exception, any direction for accumulation touching the produce of timber or wood is valid, provided it does not exceed the limits allowed by the rule against perpetuities, in which case, independently of the act, such directions would be invalid. See *Ferrand v. Wilson*, 4 Hare, 344.

Costs.

Under a direction by will to accumulate, and lay out a certain sum of money in the purchase of land, to be settled to uses thereby declared, the costs of the investment are to be paid out of the particular sum directed to be invested. *Gwyther v. Allen*, 1 Hare, 505.

Where a fund arisen from accumulations of a testator's estate, made after the period prescribed by the act, was claimed by the residuary legatees and by the next of kin, adversely to each other; the Court decided in favour of the next of kin, and ordered the costs of suit to be paid out of the fund composed of the capital of the residue and the lawful accumulations, and out of the fund in dispute, pro rata. *Elborne v. Goode*, 14 Sim. 165.

CORBYN v. FRENCH.



Feb. 14, 16, 18, 1799.

[REPORTED 4 VES. 418.]

CHARITIES—MORTMAIN ACT, 9 GEO. 2, c. 36.]—*Legacy to the trustees of a chapel for Protestant Dissenters, to be applied by them towards the discharge of the mortgage on the said chapel, is void under the statute of 9 Geo. 2, c. 36. The mortgage having been paid off by other funds in the testator's life, the Court would not say the legacy might not have been applied in repairing or sustaining the chapel, but was of opinion it could not be applied to any other charitable purpose (a).*

JOHN BROWN, by his will, dated the 18th of June, 1785, after giving some specific and pecuniary legacies, gave and bequeathed the residue of his property in the following manner :—

“The rest and residue of my estate and effects, of what kind soever, I direct may be disposed of, and the money arising from the sale to be paid unto my said trustees, to be by them invested in the public funds, or in some other good security at their discretion, and the interest thereof to be paid to my dear wife, Elizabeth, during her natural life; at her decease I direct that the sum of 500*l.* be paid to the trustees of the chapel in Essex Street (whereof the Reverend Mr. Lindsay and the Reverend Doctor Disney are ministers), to be applied by them *towards the discharge of the mortgage on the said chapel.*” And after giving certain pecuniary legacies the testator directed the residue “to be equally divided between Josiah Messer aforesaid, and John, the son of my very worthy and much respected friend and partner, Thomas Corbyn, share and share alike.”

(a) Those parts of the report of this case relating to the lapsing and vesting of legacies have been omitted in this edition.

The testator appointed — French and Josiah Messer, whom he had nominated as trustees, and — Stacey, to be his executors.

By a codicil, dated the 13th of August, 1787, after giving some legacies, he proceeded thus:—

“At the decease of my dear wife I give unto Thomas Rogers, Matthew Twogood and Michael Dodson, Esquires, treasurers to the new Academical Institution among Protestant Dissenters, or to the treasurers at the time, the sum of 2,000*l.*, to be by them applied upon the purposes of the said institution, the remainder, after payment of all legacies, &c., as before directed by my will.”

The testator died in 1788. Elizabeth Brown, his widow, died upon the 24th of December, 1797.

John Barker, one of the children of the testator's sister Elizabeth, died during the life of the testator; leaving a widow and children. Christopher Barker, another son of the testator's sister, died soon after the death of the testator, but during the life of his widow.

The bill was filed by John Corbyn, one of the residuary legatees, praying an account of the personal estate, debts, &c., and that the legacy of 500*l.* to the trustees of the Essex Street Chapel, and the legacy of 2,000*l.* to the treasurers of the Academical Institution for Protestant Dissenters, may be declared void and to have fallen into the residue.

The trustees for the chapel in Essex Street by their answer stated, that they believe the chapel, or the equity of redemption thereof, subject to a mortgage, upon which was then due the sum of 886*l.* 10*s.* and some interest, was in January, 1783, conveyed to and vested in certain trustees in fee simple, for the public worship and service of Almighty God therein; and that the said chapel and premises belonging to the same were on or about the 25th of March, 1779, conveyed to the defendant Godfrey Kettle, in fee simple, for the purpose of securing the repayment of 1,000*l.* and interest: which principal sum had been previously advanced by the Rev. Theophilus Lindsay upon the security of the said premises, and for whose benefit Godfrey Kettle was a trustee.

They admit that on or about the 6th of December, 1781, the sum of 113*l.* 10*s.*, part of the said sum of 1,000*l.* was paid off and discharged; and that the sum of 886*l.* 10*s.*, being the remainder of the said sum of 1,000*l.*, was paid off and discharged on or before the 19th

of March, 1785, by a donation by one Mr. Brooksbank; and that the same premises were reconveyed by the defendant Kettle by the direction of Theophilus Lindsay to the persons who were at that time trustees of the chapel; and they say the said mortgage was so paid off and discharged in the life of the testator and before the date and execution of his will.

The bill stated that the Academical Institution mentioned in the codicil was formed for teaching and promoting certain religious tenets and sentiments which differ from the established religion; that certain lands at Hackney were vested in trustees for the purposes of the said institution; and part of the institution was, that it should be for ever carried on upon the said premises. The bill then suggested that at the death of Elizabeth Brown the institution had ceased; but upon the answers of the trustees this part of the bill was given up.

The questions were, first, whether the legacy to the Essex Street Chapel was void within the statute (a).

Secondly, if the legacy was not void by the statute, whether, the express purpose of it having been satisfied by other means, that institution could have the benefit of it for any other purpose.

Mr. Owen for the plaintiff, and Mr. Richards for the defendant Messer, the other residuary legatee. The question upon the statute seems so clear that it is scarcely possible to argue it without hearing what can be said in support of the legacy. It cannot be distinguished from a bequest of a term for years, or a direction to the trustees to purchase a term for years. In *Widmore v. The Governors of Queen Anne's Bounty*, 1 Bro. C. C. 13 n., 33 n., the legacy was held void upon the ground that now, by the regulations that corporation has made, everything given to them must be laid out in land. There is no difference between giving a mortgage to a charity and giving a sum of money to be laid out upon a mortgage. There is an apparent distinction between this case and those in which gifts of money to be laid out upon land already in mortmain have been sustained; as where money is bequeathed to beautify or repair a chapel already erected.

Upon the second question, supposing this legacy not void by the statute, the mortgage having been paid off, and therefore the object of the legacy not being in existence, it is adeemed like a legacy of a

(a) 9 Geo. 2, c. 36.

horse, which does not exist at the death of the testator. The particular object cannot now be answered. There is no such incumbrance to be removed. The legacy is given only for the special purpose of paying off that incumbrance, not for the general purposes of the institution. There is no intimation of an intention to give them this legacy, in case the mortgage was removed. If a legacy is given for the purpose of building a church, and they will not take it for that purpose, the legacy is gone. *Attorney-General v. The Bishop of Oxford*, 1 Bro. C. C. 444, n. (b).

There is no general charitable intention, under which the Crown can have a right to appoint, the particular purpose having failed. It may be doubtful whether this institution is a charity. It is to support a chapel in which are to be received such persons as choose to attend their mode of worship differing from the established church. Is that a charity; and shall this fund go as a sum devoted generally to charitable purposes, and to be applied by the Crown? The particular object has failed: there is no intimation of any other; and there is no general charitable purpose.

Mr. *Pigott* and Mr. *Romilly*, for the trustees of the Essex Street Chapel, defendants.—This is undoubtedly a charitable purpose. *Attorney-General v. Cock*, 2 Ves. 273.

As to the objection upon the statute, this is an interest in land already in mortmain; therefore it does not fall within the authorities, that a mortgage, or a lease, or a rent, is within the statute. That only holds where the land is not already in mortmain; but you may lay out money upon land already in mortmain. It was not the object of the statute to prevent land already in mortmain from being improved. The object was to prevent *new* land from being brought into mortmain. It is assumed, that giving money to pay off a mortgage is exactly the same as if the mortgagee was to give the mortgage; but it would not be unlawful for a mortgagee to give the mortgage directly, if the land was already in mortmain. The mortgagee might by his will have given the mortgage to these trustees, having the equity of his redemption. A mortgage is certainly considered merely as a debt; though in strictness the mortgagee has the legal estate. A devise of a mortgage would be only removing the incumbrance,

(b) See the end of that cause stated in the judgment from the Registrar's Book.

and improving property already in mortmain. It would not be bringing new land into mortmain, and to prevent that is the principle of the statute, as Lord Camden held in *Widmore v. The Governors of Queen Anne's Bounty*; and that distinction, that a bequest of money to be laid out in land is good, if the land is already in mortmain, and void if not, prevailed in *Brodie v. The Duke of Chandos* and *The Attorney-General v. Hutchinson (c)*, and in other cases. *Glubb v. The Attorney-General*; *Harris v. Barnes*, Amb. 373, 651; *Attorney-General v. The Bishop of Chester*, 1 Bro. C. C. 444. The statute had two objects: first, to prevent the disinheriting of heirs; secondly, to prevent putting lands into a state of perpetuity. The principle with respect to the second object is, that the land is taken out of circulation. Upon that principle it has been decided, that a bequest of money to be laid out upon land already in mortmain, no matter to what amount, is good. That principle reaches this case. Where property is given to disencumber an estate already in mortmain, it is in point of principle the same as if it is given to improve land already in mortmain. The Court have gone so far as to say, that where the land is given by another person, the money may be used; so, where the body, for whose benefit the bequest is made, had land already in mortmain. The Court have availed themselves of all those distinctions, and have constantly said the bequest should be supported, unless it is to purchase land and bring new land into mortmain.

Many cases upon the statute are to be looked on as cases of positive law, and are not within the principle.

Upon the second point, this disposition was intended substantially for the benefit of the chapel. The application of the money is directed to that which the testator might think the most urgent purpose; but the existence of the mortgage is not of the essence of the gift. The gift is to the trustees. The application is to be by them, not by the executors. It would be a singular construction that, because the testator has pointed out the mode in which he wished this legacy, intended substantially as a benefit to the chapel, to be applied, that should be turned into a condition precedent in a Court of Justice, which is favourable to charities. The direction to apply the money distinguishes between the objects and the mode, a distinction fre-

(c) Cited in *The Attorney-General v. The Bishop of Chester*, 1 Bro. C. C. 444.

quently laid down by Lord Thurlow. The object was the chapel. The application directed was only the mode; that which the testator thought the best application for the benefit of that object. This differs essentially from *The Attorney-General v. The Bishop of Oxford*; there was no election to repair the church, or to build the chapel; the only object was to build a church. In such cases vanity is the object of the testator; to raise a monument to his own name: but it cannot be said this testator had any such intention of commemorating himself. The ademption of a legacy depends upon the testator, who must do some act to adeem; as where a specific legacy is sold by the testator. According to this argument, it would depend upon the act, not of the testator, but the trustees; upon the accident, whether they should apply any other fund to pay off this mortgage or not. Suppose it had been paid off in part only by Brooksbank's donation; upon this ground it must be contended that the legacy is good only to the extent of what remained due. They might go farther, and say nothing was due.

Consider this as a legacy to an individual, to be applied towards paying off a mortgage supposing him seised in fee. It would be considered as a legacy for his benefit; and if he did not want it for the purpose of paying off the mortgage, the Court would never compel him so to apply it. There are not many cases to be found upon the subject. In 2 Leon. 154, and 3 Leon. 65, the devise of a rentcharge to a son towards his education and bringing up in learning was held not conditional. The same construction was made upon a legacy to place a boy out apprentice, in *Barlow v. Grant*, 1 Vern. 255, and *Nevill v. Nevill*, 2 Vern. 431. There are, however, many cases in this Court of the same nature; as where a legacy is given for the maintenance and education of children, it has been ordered to accumulate for their benefit, if the father is of ability to maintain them (*d*). So upon a legacy for mourning, or for a ring, it has never been held that the legatee is to be compelled to that application.

It must be said, that the only wish of this testator was, that there should be no mortgage upon this chapel, but he did not care for the benefit of it in any other respect. That is not a rational object, nor could it be attained; for suppose the trustees thought any other mode

(*d*) *Andrews v. Partington*, 3 Bro. C. C. 60. But as to the strict rule that prevailed in that case, see *Hoste v. Pratt*, 3 Ves. 730, and *Mundy v. Earl Howe*, 4 Bro. C. C. 223.

better, they might pay off the mortgage and immediately make another, and apply the money to any other purpose in their opinion more beneficial. Suppose two testators, knowing of this mortgage, had each bequeathed 500*l.* for the purpose of paying it off, what is to be done? Is there to be a contribution? It is perfectly clear the object of both is to advance the general purpose of the charity. This mortgage is not directed to be paid off till after the death of the testator's wife. Suppose, the mortgage having been paid off, a second mortgage had been made before the death of his wife. If the case bears any resemblance to the cases of ademption, the legacy could not be applied to that mortgage; but there can be no doubt, there being at the time the Court was to act upon it a mortgage, the charity wanting the legacy for the express purpose for which it was given, the application would be made.

Mr. *Owen*, in reply.—By the express words of the will, the application is confined to that particular mortgage. Paying off that mortgage is, in other words, purchasing a term of 500 years in land. It is so considered by the defendants, who contend that a devise of the mortgage itself would be good; but the statute is not confined to land, but extends to any interest in land. This is absolutely an estate in land. How are the trustees to get this estate? After a certain time it is an absolute estate in the mortgagee. Upon a bill for redemption, there must be a reconveyance of the legal estate. There is not an end of it merely by paying the money. In the case of a legacy to A. for the benefit of his children, the children are the sole object; and if they die there is an end of it. So in this case the paying off this mortgage is the sole object. It is incumbent upon these trustees to show a trust, to which this legacy is to be applied.

Sir *R. P. Arden*, *M. R.*—This is certainly a charity. I feel great difficulty in saying this is not an interest in land. If the mortgage itself was devised to a charity, it would be clearly void. The executor would be deprived of an interest in land; and that interest would be given by will to a charitable purpose.

In *The Attorney-General v. Andrew* (3 Ves. 633), the Lord Chancellor has thought it not clear that the charitable disposition shall not be carried into execution, though Trinity College refuses it; and it was referred to the Master with that view. I suppose that proceeded

from the double object, and the interest of the other party, Merchant Taylor's School. It may be inferred, that if the testator had known the college would not have accepted it, he would have provided for the other object.

If a trustee for a charity had contracted for the purchase of an estate, would not a sum of money, bequeathed to enable him to complete that purchase, be within the statute?

For the Trustees.—I should feel a difficulty in the case of a contract only. The trustee would have only an equitable estate; but a mortgagor is always considered as owner of the estate, with an incumbrance upon it.

The Master of the Rolls was inclined to direct an inquiry into the nature of this chapel; but afterwards observing, that it appeared by the will that there were ministers, he seemed to think that would prevent the necessity of the inquiry. However, it was admitted on both sides, that this chapel was used for the purpose of public worship, by a society of Protestant Dissenters, and was duly licensed under the Toleration Act.

Sir R. P. Arden, M. R.—The question as to the legacy of 500*l.* under this will is, whether, under the late statute (*e*), or on account of the nature of the application of the money to the particular purpose therein mentioned, it is good or void.

It is insisted, that this being in its nature a charitable use, the bequest of this money to be applied in redemption of the mortgage is within the Statute of Mortmain, commonly so called, but very improperly; for it does not prevent the alienation of land in mortmain; nor was that the object of the act. It has nothing to do with that. The object was to prevent devises of land, or any interest in land, or bequests of money to be laid out in any such interest, for any charitable use whatsoever.

It is likewise insisted, that if this legacy is not void under that statute, inasmuch as at the death of the testator the mortgage was paid off, and therefore that object cannot now be attained, it is not applicable to any other purpose for the benefit of that society; and as the object pointed out by the will cannot arise, the fund will belong to

(*e*) 9 Geo. 2, c. 36.

residuary legatees. I am in their favour upon both points ; but it is not necessary to dwell long upon the second, if I am right upon the first.

It was insisted, and with success, that though the construction of this statute has been extremely rigorous, and many determinations upon it have been thought to carry it even beyond what the legislature had in contemplation at the time ; as, for instance, when part of a residue given to a charity consists of mortgages, or other securities upon land, though it was held that it was not an immediate gift of an interest in land, being only what should remain after the debts were paid, and it was melted into money, it was determined that, as to so much of the residue as consisted of securities upon land, the charity could not take any part of the residue so constituted (*f*) ; yet there have been repeated determinations that it is competent to a testator, though not to give directly any interest in land to a charitable use, to leave a sum of money for the purpose of meliorating, as it is called, any land, or for beautifying, sustaining or repairing buildings, already vested in trustees for charitable uses ; and no doubt, I believe, is now entertained upon it ; and many cases have been determined upon the distinction, whether it is clear the testator meant the money to be applied in erecting, sustaining or repairing buildings, upon land already vested in trustees for charitable uses, or had any object of having fresh land purchased for that purpose (*g*). It is said, this case is analogous to those cases in which the Court has established, in favour of a charity, a disposition not of an interest in land, or of a sum of money bequeathed for the purchase of any interest in land, but for the purpose of meliorating an estate already vested in trustees for charitable uses. I am of opinion that cannot be considered as the true construction of this gift. The words of the statute, which go far beyond the title, are very express. It is called an act to restrain the disposition of lands, whereby the same become unalienable. It then recites that gifts or alienations of lands, tenements or hereditaments, in mortmain, are restrained by *Magna Charta*, and other laws, as against the common utility ; nevertheless, this public mischief has of late greatly increased by many large and improvident alienations or dispositions to

(*f*) *Pickering v. Lord Stamford*, 2 Ves. jun. 272, 581 ; 3 Ves. 332, 492 ; *Howse v. Chapman*, 4 Ves. 542 ; *Knapp v. Williams*, 4 Ves. 430, n. ; *Attorney-General v. Caldwell*,

Amb. 635 ; *Attorney-General v. Meyrick*, 2 Ves. 44.

(*g*) See *Blandford v. Thackerell*, 2 Ves. jun. 238.

uses, called charitable uses (not dispositions in mortmain) ; and the first clause enacts, that no manors, lands, tenements, rents, advowsons or other hereditaments, corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements or hereditaments, shall be conveyed or settled to or upon any person or persons, bodies politic or corporate (that is the only case in which it could be in mortmain), or otherwise for any estate or interest whatsoever, or anyways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever, unless such gift, conveyance, &c., of any such lands, &c., money or personal estate (other than stocks in the public funds), be made by deed indented, sealed and delivered in the presence of two witnesses, twelve months before the death of the donor or grantor, and enrolled in the Court of Chancery within six months after execution ; and unless such stocks be transferred six months before the death of such donor or grantor, and unless the same be made to take effect in possession for the charitable use intended immediately, and be without any power of revocation, &c. ; and also subject to the provision by the second clause in favour of purchasers *bonâ fide* for valuable consideration.

The third clause enacts, that all gifts, grants, conveyances, &c., of any lands, tenements or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable use whatsoever, made in any other manner than by the act is directed, shall be absolutely void.

Upon the third clause this question arises, whether this is or is not a legacy to be applied in the purchase of an interest in land, or a charge or incumbrance affecting the same ? I am of opinion this is directly in words given for that purpose. Without all question, unless the other argument is resorted to, it is a direction to apply this money in the purchase of that interest then affecting those premises.

But it is said those premises were already appropriated to the same use for which this mortgage was to be redeemed; and it is further insisted, that if the testator had been himself the mortgagee, and had directly given the mortgage by his will to these trustees, having the equity of redemption, it is something like beautifying, sustaining or repairing buildings, money given to be laid out upon land already vested in trustees for a charitable use; but I deny that. The land was never given to that charitable purpose. This is an interest in the land never given to that purpose. They had all the estate but this mortgage interest, and the purpose was to give those trustees who had the estate subject to this interest, which is in other persons, a larger and more extensive interest than they had before. I am of opinion it is within the statute. It is nothing but a sum of money given for the purpose of procuring first, and then conveying to the trustees, this further, greater and more extensive interest than they had before. I should be sorry to refine upon the statute, or to be more rigorous in the construction than former decisions warrant: not that I wish to defeat the statute, but I wish fairly to construe it.

The Court has gone so far as to hold, that a sum of money secured upon turnpike tolls is an interest in land within the act (*a*). This is not like the case of a building. It is very unfortunate that the testator in such a case should have taken this method of giving it, for he might have done it in a more direct way; and I am aware that all these refinements upon the statute are not using it for the purpose for which it was intended. If a man devises his lands to be sold, and directs the money to be applied to a charitable use, the statute says it is void (*b*). I put a case, the answer to which I expected. It is said, that if the trustee for a charity has got any interest in land, the increasing that interest or applying money by will to make it good is not an interest in land within the statute. I put the case of the trustee having contracted for the purchase of an estate, and money being left to enable him to complete that purchase. The counsel for the charity could not say that would not be within the statute. Suppose a part of the money was paid and part not, if the whole could not be applied no part could. Where is the difference? Till the mortgage was paid off the trustees had not that purchase. I am

(*a*) *Knapp v. Williams*, 4 Ves. 430, n.

(*b*) *Curtis v. Hutton*, 14 Ves. 537.

therefore of opinion that this sum of money bequeathed to redeem the mortgage upon this chapel is void by the statute.

If I am right upon that point, perhaps the other consideration is immaterial; but as the point was made I will say a few words upon it, for the purpose of having *The Attorney-General v. The Bishop of Oxford* (1 Bro. C. C. 444 n. b), which has been mistaken, perfectly understood.

It is said, supposing this legacy is not void by the statute, it is not so confined to the purpose of paying off the mortgage, as that, in case that was paid off without the knowledge of the testator, I may not infer an intention under which it may be applied to other beneficial purposes for this society. I confess the inclination of my opinion is otherwise. The true question is, can any intention be collected beyond that of securing to them the enjoyment of this building; any intention that, after having provided for that object, if the whole was not necessary for that, the surplus should be applied for any other beneficial purpose in favour of the society? I am of opinion no such intention can be collected. I will not say, that if this legacy was not void by the statute it might not be applied to sustaining and repairing that building; but that it can be applied to any other purpose I deny, if *The Attorney-General v. The Bishop of Oxford* is right.

The first decree in that cause was made upon the 13th of July, 1786, and is in the Registrar's Book A. 1785. The decree by the Lords Commissioners in 1792 is in the Registrar's Book 611. The testator, after giving to his executors 100*l.* each for their trouble, gave and bequeathed the rest and residue of his personal estate upon trust "to build a church at Wheatley, where the chapel now is, in such manner as I shall hereafter direct, or, for want of such direction, as my executors shall think fit."

The Bishop of Oxford, who was patron and parson of Cuddesden, in which Wheatley was, opposed the design of building a church; and it was proposed by the defendants that the salary of the chaplain should be increased. The next of kin insisted that a new church must be built, and that the surplus belonged to them. By the first decree it was referred to the Master to take the accounts; and it was directed that the defendants, the Bishop of Oxford, &c., do signify whether they are willing that the residue of the testator's personal estate shall be laid out in building a church at Wheatley, where the

chapel now stands, with liberty to lay a plan before the Master how the said residue may be most beneficially applied according to the will of the testator.

Before the cause came on again many transactions had taken place. The next of kin, and the persons entitled to the benefit under the will, the parishioners acting by the bishop and their wardens, came to an agreement that 3,000*l.*, part of the residue of the testator's personal estate, should be applied for the purpose of building a new church and forming a fund for keeping it in repair; and that 1,000*l.*, other part thereof, should be applied towards augmenting the minister's salary; and that 4,000*l.* being paid for the purposes aforesaid, the residue should belong to the next of kin. This agreement is recited in the decree; and by consent it was ordered, that the sum of 4,000*l.* being paid for the purposes aforesaid the residue be paid to the next of kin.

This decree is completely decisive, that the object not being capable of taking effect, the fund could not be applied to any other charitable purpose. The Court could not have made the decree, unless they thought the residue was not applicable to any other charitable purpose. I will not say it could not have been applied for repairing or sustaining the chapel; and I doubt whether Lord Kenyon said so; but beyond that purpose, or after satisfying it, this is decisive, that it could be applied to no other purpose; for if it was applicable to any other general charitable purpose, or any other purpose for the benefit of that parish, except of the nature pointed out, that decree could not have been justified.

If, therefore, this legacy was not void upon the statute, I should pause upon the question whether I could apply it to any other purpose. I see the testator intended it to provide for these persons a place of worship. I see no other intention; and I think I could not apply it to increase the salary of the ministers, or for any other purpose. In looking over these cases, understanding that the question, how far a legacy given to a charitable purpose may be applied to any other purpose than that specified, is now depending before the Lord Chancellor, in *The Attorney-General v. Andrew*, I find that in *Moggridge v. Thackwell* (1 Ves. jun. 469), Lord Thurlow makes this observation: "Baxter's case was very strong; and perhaps would not now be followed. The legacy was deemed to be void, because for

forbidden uses; and yet the Court thought, that as it was declared to be for charity, it should go to charities to be declared by the Court. I do not mean to state that as an authority; for it is very hard indeed that the Court should give it to other charities, because those which were mentioned could not take." I confess I very much agree with this doctrine.

Declare the legacy of 500*l.* void under the statute 9 Geo. 2, c. 36.

The policy of the act of 9 Geo. 2, c. 36, commonly, though (as observed by the Master of the Rolls in the principal case) improperly, termed the Statute of Mortmain, has of late years been loudly impugned by many parties, but without sufficient reason. Lord Hardwicke's view of the intention and policy of its framers seems to be correct:—"This, though mentioned as a barbarous act," says his Lordship, "is quite otherwise; far from being a prohibition of charitable foundations, it only restrains the method, leaving the disposition of personal property thereto free. The particular views of the legislature were two:—*First*, to prevent the locking up of land and real property from being aliened, which is made the title of the act; the *second*, to prevent persons in their last moments from being imposed on to give away their real estates from their families. With regard to the *latter view*, it was a very wise one; for by that means, in times of popery, the clergy got almost half the real property of the kingdom into their hands; and, indeed, I wonder they did not get the rest; as people thought they thereby purchased heaven. But it is so far

from being charity or piety, that it is rather a monument of impiety, and of the vanity of the founders. As to the other view, it is of the last consequence to a trading kingdom; to which, indeed, the locking up of land is a great discouragement." *Attorney-General v. Day*, 1 Ves. 223; see also *Durour v. Motteux*, 1 Ves. 321; *Vaughan v. Farrer*, 2 Ves. 189; *Attorney-General v. Lord Weymouth*, Amb. 23; *Boson v. Statham*, 1 Cox, 20; *S. C.* 1 Eden, 510.

The object of that act, which is entitled "An Act to restrain the Disposition of Lands, whereby the same become unalienable," appears in the preamble, which after reciting that "Whereas gifts or alienations of lands, tenements and hereditaments in mortmain, are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless, this public mischief has of late greatly increased, by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison

of their lawful heirs," enacts, "That from and after the 24th of June, 1736, no manors, lands, tenements, rents, advowsons or other hereditaments, corporeal or incorporeal, whatsoever, *nor* any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, *to be laid out or disposed of in the purchase of any lands, tenements or hereditaments*, shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or *for the benefit of any charitable uses* whatsoever, *unless* such gift, conveyance, appointment or settlement of any such lands, tenements or hereditaments, sum or sums of money or personal estate (other than stocks in the public funds), be made by deed *indented*, sealed and delivered in the presence of two witnesses, *twelve* calendar months at least before the death of the donor or grantor (including the days of the execution and death), and be *enrolled* in the Court of Chancery within *six* calendar months after the execution thereof; and *unless* such stocks be transferred in the public books, usually kept for the transfer of stocks, *six* calendar months at least before the death of such donor or grantor (including the days of the transfer and death), and unless the same be made to take effect in *possession* for the

charitable use intended, immediately from the making thereof, and be *without* any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him." Sect. 1.

By sect. 2 it is provided, "That nothing hereinbefore mentioned relating to the sealing and delivering of any deed or deeds twelve calendar months at least before the death of the grantor, or to the transfer of any stock six calendar months before the death of the grantor, or person making such transfer, shall extend, or be construed to extend, to any *purchase* of any estate or interest in lands, tenements or hereditaments, or any transfer of any stock to be made really and *bond fide* for a full and valuable consideration actually paid at or before the making such conveyance or transfer, without fraud or collusion."

By sect. 3 it is enacted, "That all gifts, grants, conveyances, appointments, assurances, transfers and settlements whatsoever, of any lands, tenements or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements or hereditaments, or of any stock, money, goods, chattels or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any chari-

table uses whatsoever, which shall at any time, from and after the said 24th day of June, 1736, be made in any other manner or form than by this act is directed and appointed shall be absolutely and to all intents and purposes null and void."

By sect. 4 it is provided, "That this act shall not extend, or be construed to extend, to make void the dispositions of any lands, tenements or hereditaments, or of any personal estate to be laid out in the purchase of any lands, tenements or hereditaments, which shall be made in any other manner or form than by this act is directed, to or in trust for either of the two universities within that part of Great Britain called England, or any of the colleges or houses of learning within either of the said universities, or to or in trust for the colleges of Eton, Winchester or Westminster, or any or either of them, for the better support and maintenance of the scholars only upon the foundations of the said colleges of Eton, Winchester and Westminster."

By sect. 5 it is provided and enacted, "That no such college or house of learning, which doth or shall hold or enjoy so many advowsons of ecclesiastical benefices as are or shall be equal in number to one moiety of the fellows or persons usually styled or reputed as fellows; or, where there are or shall be no fellows, or persons usually styled or reputed as fellows, to one moiety of the students upon the foundation, whereof any such college or house of learning doth or may, by the present constitution of such college or

house of learning, consist, shall, from and after the 24th day of June, 1736, be capable of purchasing, acquiring, receiving, taking, holding or enjoying any other advowsons of ecclesiastical benefices by any means whatsoever; the advowsons of such ecclesiastical benefices as are annexed to or given for the benefit or better support of the headships of any of the said colleges or houses of learning, not being computed in the number of advowsons hereby limited."

By sect. 6 it is provided, "That nothing in this act contained shall extend, or be construed to extend, to the disposition, grant or settlement of any estate, real or personal, lying or being within that part of Great Britain called Scotland."

This statute, it will be observed, does not interfere with the disposition of pure personalty in favour of a charity. It has been considerably modified by subsequent statutes, which, in discussing the decisions upon its different enactments, will be hereafter noticed.

In examining the subject discussed in the principal case, we may consider, *first*, what constitutes a charity, especially as contradistinguished from what are termed superstitious uses; *secondly*, what gifts to charities by deed are valid, as complying with the requisitions of the statute, and subsequent statutes modifying or altering its provisions; *thirdly*, what gifts are invalid, as being made by will, and being either realty or savouring of realty, and therefore against the policy of the statute; *fourthly*, dis-

positions to charities not coming within, and exceptions from, 9 Geo. 2, c. 36; *fifthly*, the construction adopted by Courts of Equity with regard to valid gifts to charities, and herein of the doctrine of *cy-près*; *sixthly*, the administration of charitable trusts; *seventhly*, as to donations and bequests to charitable uses in Ireland.

I. *What constitutes a Charity, especially as contradistinguished from Superstitious Uses.*

The term charity, as observed by Sir William Grant, M. R., in its widest sense, denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in the Court of Chancery, for there its signification is derived chiefly from the statute of 43 Eliz. c. 4, commonly called the Statute of Charitable Uses. Those purposes are considered charitable, 1stly, which that statute enumerates; or, 2ndly, which by analogy are deemed within its spirit and intendment. 9 Ves. 405.

The charitable purposes enumerated by the statute of 43 Elizabeth, c. 4, are as follows:—"Relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; repair of bridges, ports, havens, causeways, churches, sea banks and highways; education and preferment of orphans; relief, stock or maintenance for houses of correction; marriages of poor maids; supportation, aid and help of young

tradesmen, handicraftsmen and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes."

Charities coming within the Statute of 43 Elizabeth, c. 4.

Gifts to the poor either generally (*Attorney-General v. Matthews*, 2 Lev. 167; and see *Nash v. Morley*, 5 Beav. 177; *Thompson v. Corby*, 27 Beav. 649), or of a particular locality (*Attorney-General v. Clarke*, Amb. 422; *Bristow v. Bristow*, 5 Beav. 289; *Attorney-General v. Bovill*, 1 Ph. 762; *Attorney-General v. Wilkinson*, 1 Beav. 370; *In re Lambeth Charities*, 22 L. J., Ch. 959), by which persons receiving parochial relief will not in general receive benefit (*Attorney-General v. Clarke*, Amb. 422; *Bishop of Hereford v. Adams*, 7 Ves. 324; *Attorney-General v. Corporation of Exeter*, 2 Russ. 47; 3 Russ. 396; *Attorney-General v. Brandreth*, 1 Y. & Coll. C. C. 200; *The Attorney-General v. Wilkinson*, 1 Beav. 373; *Attorney-General v. Bovill*, 1 Ph. 762; sed vide 2 Russ. 53, 54; *Attorney-General v. Bizard*, 21 Beav. 233); bequests to the poor of a workhouse (*Attorney-General v. Vint*, 3 De G. & Sm. 704), or hospital (*Corporation of Reading v. Lane*, Duke, 81, 111), or emigrating to particular colonies (*Barclay v. Maskelyne*, 4 Jur., N. S. 1294), to a parish generally (*West v. Knight*, 1 Ch. Cas. 134; *Champion v. Smith*, Duke, 81; *Attorney-General v. Hotham*, T. & R. 209; *Attorney-General v. Webster*, 20 L. R., Eq.

483), to the masters and governors of an hospital (*Mayor of London's Case*, Duke, 83, 111), to the widows and orphans of a parish (*Attorney-General v. Comber*, 2 S. & S. 93), or to the widows and children of seamen belonging to a town (*Powell v. Attorney-General*, 3 Mer. 48); to "poor relations," "poor kinsmen and kinswomen" (*Green v. Howard*, 1 Bro. C. C. 31; *Mahon v. Savage*, 1 S. & L. 111), have been held to come within the statute (sed vide *Brunsdon v. Woolledge*, Amb. 507; 1 Dick. 380; *Thomas v. Howell*, 18 L. R., Eq. 198). And a gift for the perpetual benefit of poor relations may be sustained as a charity, although if it were made to them as individuals it would be void, as contravening the rule against perpetuities (*White v. White*, 7 Ves. 423; *Isaac v. De Friez*, 17 Ves. 373, n.; *Attorney-General v. Price*, Ib. 371; *Attorney-General v. Duke of Northumberland*, 7 Ch. D. 745). And recently a bequest to the lineal descendants of the testator's uncle, as they may severally stand in need, has been held a good charitable gift. See *Gillam v. Taylor*, 16 L. R., Eq. 581; sed vide *Liley v. Hay*, 1 Hare, 580.

To constitute, however, a gift to "the poor" or "poorest" of a specified class of persons a charitable gift, it must be construed as a gift to the actually poor, and not to the least wealthy of a wealthy class. See *Attorney-General v. Duke of Northumberland*, 7 Ch. D. 745, disapproving of the dictum of Wickens, V. C., in *Gillam v. Taylor*, 16 L. R., Eq. 581.

The colleges of the universities of Oxford and Cambridge, under the authority of an act of parliament (19 & 20 Vict. c. 88), and by the machinery of commissioners, may become the beneficial owners of property the trusts of which they accepted for the benefit of the kindred of the donor. See *Attorney-General v. Sidney Sussex College*, 4 L. R., Ch. App. 722.

Again, gifts for the advancement of learning, as "for the benefit and advancement and propagation of education and learning in any part of the world" (*Whicker v. Hume*, 1 De Gex, Mac. & G. 506; 7 H. L. Ca. 124), or to build or erect a school, or free grammar-school (*Case of Rugby School*, Duke, 80, 112; *Gibbons v. Maltyard*, Duke, 111; Poph. 6), even a school for the sons of gentlemen (*Attorney-General v. Earl of Lonsdale*, 1 Sim. 109), or to maintain a schoolmaster (*Hynshaw v. The Corporation of Morpeth*, Duke, 69), or to the masters and fellows of a college (*Plate v. St. John's College*, Duke, 77, 111), or for the foundation of a scholarship (*Rex v. Newman*, 1 Lev. 284), fellowship (*Case of Jesus College*, Duke, 78, 111) or lectureship (*Attorney-General v. The Margaret and Regius Professors in Cambridge*, 1 Vern. 55), in a college at one of the universities, have been held to be charitable within the intent of the statute. And see the case of *Christ's College, Cambridge*, 1 Wm. Black. 90; S. C. 1 Eden, 10; Amb. 351; *Attorney-General v. Whorwood*, 1 Ves. 537; *Porter's Case*, 1 Co. 25 b.

A bequest to the widows and

children of seamen at a town (*Powell v. Attorney-General*, 3 Mer. 48), to the widows and orphans of a parish (*Attorney-General v. Comber*, 2 S. & S. 93), to twenty aged widows and spinsters of a parish (*Thompson v. Corby*, 27 Beav. 649), to poor pious persons (*Nash v. Morley*, 5 Beav. 177), and a bequest for releasing debtors, and for old decayed tradesmen (*Attorney-General v. The Painters' Company*, 2 Cox, 51; *Attorney-General v. The Ironmongers' Company*, 2 M. & K. 576), have been held to be within the act.

A bequest to individuals either by name (*Doe d. Phillips v. Aldridge*, 4 I. R. 264; *Donellan v. O'Neill*, 5 I. R., Eq. 529), or to be selected by another, although the motive is charity, will not amount to a charitable gift within the statute, as it is not for the maintenance of a charity. Thus a bequest of moneys to be distributed by A. among sixty pious ejected ministers (*Attorney-General v. Hughes*, 2 Vern. 105, as explained in *Moggeridge v. Thackwell*, 7 Ves. 76; reversing *S. C. nom. Attorney-General v. Baxter*, 1 Vern. 248), a bequest of a sum of money to each of ten poor clergymen of the Church of England to be selected by A. (*Thomas v. Howell*, 18 L. R., Eq. 198), were held not to be charitable.

Charities by Analogy within the Statute of Elizabeth.

With regard to cases not coming expressly within the terms, but which, by analogy, have been deemed within the spirit and intentment, of the statute of Eliza-

beth, may be mentioned gifts for religious purposes, as for repairs, furniture, or ornaments of a church (*Attorney-General v. Ruper*, 2 P. Wms. 125; *Attorney-General v. Vivian*, 1 Russ. 226; Duke, 109), or chancel (*Hoare v. Osborne*, 1 L. R., Eq. 585); for the perpetual repair of an ornamental memorial window (Ib.), or monument (Ib.), in a church; or to a minister for preaching (*Gibbons v. Maltyard*, Duke, 111; Poph. 6; *Pember v. Inhabitants of Knighton*, Duke, 82, 109; Poph. 139; *Penstred v. Payer*, Duke, 82; 1 Eq. Ca. Abr. 95, pl. 3); for a priest and his successors (*Thornber v. Wilson*, 3 Drew. 245; *Robb v. Donan*, 9 I. R., C. L. 483); for a pension for a perpetual curate (*Attorney-General v. Parker*, 1 Ves. 43; 14 Ves. 7), or for unbeneficed curates (*Pennington v. Buckley*, 6 Hare, 453); augmentations by ecclesiastical persons to small vicarages and curacies (*Attorney-General v. Brereton*, 2 Ves. 426); gifts to Queen Anne's Bounty (*Widmore v. Woodroffe*, Amb. 636; *S. C.* 1 Bro. C. C. 13, n.; *Middleton v. Clitherow*, 3 Ves. 734), or for the advancement of Christianity among infidels (*Attorney-General v. City of London*, 1 Ves. jun. 243; 3 Bro. C. C. 171); for the distribution of Bibles, and other religious books and tracts (*The Attorney-General v. Stepney*, 10 Ves. 22; and see *Townsend v. Carus*, 3 Hare, 257; *Powerscourt v. Powerscourt*, 1 Moll. 616), amongst which it seems that even Johanna Southcott's works have been included (*Thornton v. Howe*, 8 Jur., N. S. 663); for the increase and encouragement of good servants

(*Loscombe v. Wintringham*, 13 Beav. 87); for letting out land to the poor at a low rent (*Crafton v. Frith*, 15 Jur. 737; 20 L. J., N. S., Ch. 199), or for deserving literary men who have not been successful (*Thompson v. Thompson*, 1 Coll. 395); for the repairs of chimes and payment of singers of a church (*Turner v. Ogden*, 1 Cox, 316), or for keeping up an organ, and as a stipend for the organist (*Attorney-General v. Oakaver*, cited 1 Ves. 535; in which case, however, Lord Hardwicke held an annuity to choristers of a parochial church not to be a charitable use). A bequest for building, maintaining or keeping in repair vaults or tombs of the testator or his family not being within a church, although the authorities are somewhat conflicting, is not charitable (*Masters v. Masters*, 1 P. Wms. 422, 423, n. 1; *Durour v. Motteux*, 1 Ves. 320; *Gravenor v. Hallum*, Amb. 643; *Doe d. Thompson v. Pitcher*, 3 Mau. & Sel. 407; *S. C.* 2 Marsh. 61; 6 Taunt. 359; and see *Mitford v. Reynolds*, 1 Ph. 185, 198; *Mellick v. The President, &c. of the Asylum*, Jac. 180; *Adnam v. Cole*, 6 Beav. 353; *Lloyd v. Lloyd*, 2 Sim., N. S. 255; *Willis v. Brown*, 2 Jur. 987; *Rickard v. Robson*, 31 Beav. 244; 8 Jur., N. S. 665; *Hoare v. Osborne*, 1 L. R., Eq. 587; *Yeap Cheah Neo v. Ong Cheng Neo*, 6 L. R., P. C. C. 381); and if it comes within the rule against perpetuities it is void. *Rickard v. Robson*, 31 Beav. 244; *Gravenor v. Hallum*, Amb. 643; *Doe d. Thompson v. Pitcher*, 3 Mau. & Selw. 407; 2 Marsh. 61; 6 Taunt. 359.

But a bequest for the perpetual repair of a memorial window, or monuments *within* a church, has been held a good charitable bequest. See *Hoare v. Osborne*, 1 L. R., Eq. 585.

Moreover, gifts for public and general purposes are within the intent of the Statute of 43 Elizabeth, c. 4, although they may be for the benefit of the rich as well as the poor.

It is not material that the particular public or general purpose is not expressed in the Statute of Elizabeth, all other legal, public or general purposes being within the equity of that statute. Thus a gift to maintain a preaching minister, a gift to build a sessions house for a county, a gift by parliament of a duty on coal imported into London, for the purpose of rebuilding St. Paul's Church, after the Fire of London, have all been held charitable uses within the equity of the Statute of Elizabeth (per Sir John Leach, in *Attorney-General v. Heelis*, 2 S. & S. 76). So funds derived from the gift of the Crown, or the gift of the legislature, or from private gift, for paving, lighting, cleansing and improving a town, are within the equity of the Statute of Elizabeth, and are to be administered as charitable funds (Ib. 77; and see *Howse v. Chapman*, 4 Ves. 542; *Attorney-General v. Heelis*, 2 S. & S. 67, 76, 77). So gifts to bring spring water for the inhabitants of a town (*Jones v. Williams*, Amb. 651); to build a sessions house or house of correction (Duke, 109, 136); for the repair of highways (*Eltham Parish v. War-*

reyn, Duke, 67; *Collison's Case*, Hob. 136); for a life-boat (*Johnston v. Swann*, 3 Madd. 457); for an institution for studying and endeavouring to cure maladies of any quadrupeds or birds useful to man (*The University of London v. Yarrow*, 23 Beav. 159; 1 De G. & Jo. 72); for a botanical garden for the public benefit (*Townley v. Bedwell*, 6 Ves. 194); to an institution, as the British Museum, established by the legislature, for the collection and preservation of objects of science and works of art, and intended for public improvement (*Trustees of the British Museum v. White*, 2 S. & S. 594); to the Royal Society, the object of which is for improving natural knowledge (*Beaumont v. Oliviera*, 4 L. R., Ch. App. 309; 6 L. R., Eq. 534), the Royal Geographical Society, the object of which is the improvement and diffusion of geographical knowledge (Ib.); to charitable, beneficial and public works (*Mitford v. Reynolds*, 1 Ph. 185); for such charities and other public purposes as lawfully might be in a particular parish (*Dolan v. Macdermot*, 5 L. R., Eq. 60; 3 L. R., Ch. App. 676); "to or amongst the different institutions (before named), or to any other religious institution or purpose" as the trustees may think proper (*Wilkinson v. Lindgren*, 5 L. R., Ch. App. 570); "to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country Great Britain" (*Nightingale v. Goulbourn*, 2 Ph. 594, affirming the decision of Sir James Wigram, V.C., 5 Hare, 487),

have been held to come within the meaning of the Statute of Elizabeth.

It seems that a gift towards payment of the national debt (see *Thellusson v. Woodford*, 4 Ves. 235, 298, 310, 343; *Newland v. Attorney-General*, 3 Mer. 684; *Trustees of the British Museum v. White*, 2 S. & S. 594), or in discharge of taxes levied on a particular town (*Attorney-General v. Bushby*, 24 Beav. 290), would be considered a charitable gift.

Where, however, an act of parliament passes for paving, lighting, cleansing and improving a town, to be paid for wholly by rates or assessments to be levied upon the inhabitants of that town, the funds so raised being in no sense derived from bounty or charity, in the most extensive sense of that word, are not charitable funds to be administered in a Court of Equity. 2 S. & S. 77, per Sir John Leach, V.C.; see also *Thorn-ton v. Howe*, 31 Beav. 14.

A bequest to trustees for the purpose of distribution by a religious community, as of nuns, amongst the poor or suffering classes, has been held good as a charity. See *Carbery v. Cox*, 3 Ir. Ch. Rep. 231; *Dillon v. Reilly*, 10 Ir. R., Eq. 152; *Nash v. Morley*, 5 Beav. 177; *Townsend v. Carus*, 3 Hare, 257; *Walsh v. Gladstone*, 1 Ph. 290.

So a bequest to a voluntary association, as of nuns, united for the purpose of "teaching the poor and nursing the sick," is charitable. See *Cocks v. Manners*, 12 L. R. Eq. 574, 584.

A bequest however to a society of a like character for the use and benefit of the members of the com-

munity, irrespective of the charitable objects thereof, has been held not to be charitable. *Stewart v. Green*, 5 Ir. R., Eq. 470.

And it seems that religious purposes are charitable only when the religious services tend directly or indirectly to the instruction or edification of the public. This proposition is well illustrated by the case of *Cocks v. Manners*, 12 L. R., Eq. 574. There a residue, consisting of pure and impure personalty, was left between two religious institutions, one being a Dominican convent—an institution consisting of Roman Catholic females living together by mutual agreement in a state of celibacy, under a common superior, for the purpose of sanctifying their own souls by prayer and pious contemplation; the other being a community of sisters of charity of St. Paul, at Selley Oak, which was composed of Roman Catholic women living together by mutual consent, whose primary object was personal sanctification, and who, as a means thereto, employed themselves in the exercise of works of piety and charity, in teaching the poor and nursing the sick, and the payments were directed to be made to the superior for the time being respectively. It was held by Wickens, V. C., first, that the community of sisters of charity of St. Paul was a voluntary association and a charitable institution, and that the bequest to them was good as to the pure personalty only; secondly, that the bequest to the Dominican convent was not charitable either within the letter or spirit of 43 Eliz. c. 4, and that, as it was not void on the ground of

perpetuity, it was good both as to the pure and impure personalty. “A voluntary association of women,” said his Honor, “for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution, whether the word ‘charitable’ is used in its popular or in its legal sense.”

Devises or bequests for private charities (*Ommanney v. Butcher*, T. & R. 260; *Kendall v. Granger*, 5 Beav. 303), to a friendly society (*In re Clark's Trust*, 1 Ch. D. 497), or to found a private museum (*Thompson v. Shakespeare*, Johns. 612; 1 De G., F. & Jo. 399; *Carne v. Long*, 2 De G., F. & J. 75; 4 Jur., N. S. 740; *Ib.* 639), or to distribute rents and profits among certain families according to their circumstances (*Liley v. Hey*, 1 Hare, 580), or to a chartered company in London to increase the stock of corn they were compelled to keep (*Attorney-General v. Haberdashers' Company*, 1 My. & K. 420), are not charitable within the meaning of the Statute of Elizabeth. See also *Re Dutton*, 4 Ex. D. 54.

Gifts of an indefinite and general character, for the purposes of benevolence or general liberality, without the mention of specific objects, are not charitable. *Morice v. The Bishop of Durham*, 9 Ves. 399; *Ommanney v. Butcher*, T. & R. 260; *James v. Allen*, 3 Mer. 17; *Williams v. Kershaw*, 1 My. & Cr. 298, cited; *Ellis v. Selby*, 1 My. & Cr. 286; *Kendall v. Granger*, 5 Beav. 300; *Nash v. Morley*, 5 Beav. 177; *Vezey v. Jamson*, 1 S. & S. 69.

Other bequests, apparently cha-

ritable, will be held void if contrary to the policy of the law, as a bequest to be applied in purchasing the discharge of persons committed to prison for non-payment of fines under the Game Laws (*Thrupp v. Collett*, 26 Beav. 125), or "towards the political restoration of the Jews to Jerusalem and to their own land," the promotion of such an object not being consistent with our amicable relations with the Sublime Porte. *Habershon v. Vardon*, 4 De G. & Sm. 467.

Superstitious Uses.

We must, however, carefully distinguish a charitable use, from what is termed a superstitious use. The latter has been defined "one which has for its object the propagation of the rites of a religion not tolerated by the law" (Boyle, 242). The law relating to superstitious uses depends partly upon the common law and partly upon statutes. *Rex v. Portington*, 1 Salk. 162.

The statutes relative to superstitious uses are 23 Hen. 8, c. 10; 1 Edw. 6, c. 14; and 1 Geo. 1, c. 55; repealed by 31 Geo. 3, c. 32, s. 21.

The persons who in this country have been held to be obnoxious to the law against superstitious uses may be divided into three classes—1. Roman Catholics; 2. Protestant Dissenters; 3. Jews.

With regard to Roman Catholics, gifts for the maintenance of Roman Catholic monasteries or other establishments at home or abroad (*De Garcin v. Lawson*, 4 Ves. 433, n.) for the purpose of maintaining Roman Catholic priests (*Gates v. Jones*, cited 2 Vern. 266), or to be applied

to such purposes as a superior of a nunnery or her successor should judge most expedient (*Smart v. Prujean*, 6 Ves. 560), or for masses or prayers for a person's soul (*Adams v. Lambert*, 4 Co. 529; *West v. Shuttleworth*, 2 M. & K. 684; *Attorney-General v. The Fishmongers' Company*, 2 Beav. 151; 5 My. & Cr. 11); for disseminating Roman Catholic doctrines, either by the education of the children of the poor (*Croft v. Evetts*, Mo. 784; *Attorney-General v. Power*, 1 Ball & B. 145; *Cary v. Abbot*, 7 Ves. 490), or for the purpose of maintaining a Roman Catholic priest (*The Attorney-General v. Todd*, 1 Keen, 803); for the publication of a treatise inculcating the doctrine of the absolute and inalienable supremacy of the Pope in ecclesiastical matters (see *De Theminnes v. De Bonneval*, 5 Russ. 288), have been held void as superstitious.

Formerly, gifts in favour of the places of worship, ministers, or schools of Protestant Dissenters, would have been invalid, as being superstitious, that is to say, as tending to disseminate doctrines contrary to those of the established religion. *Tudor's Charitable Trusts*, 20, 2nd ed.; and see *Attorney-General v. Baxter*, 1 Vern. 248; 1 Eq. Ca. Ab. 96, pl. 9.

With regard to the Jewish religion, it was held by Lord Hardwicke, that a bequest for the maintenance of a Jesiba, or an assembly for reading the Jewish law, was invalid (*Da Costa v. De Pas*, 2 Swanst. n. 487, 413; *S. C.* 1 Amb. 228; 1 Dick. 258; and see *Isaac v. Gompertz*, 7 Ves. 61, cited); but

Lord Hardwicke, in the first-mentioned case, said, that bequests for poor persons of the Jewish religion were good; and in *Straus v. Goldsmid*, 8 Sim. 614, Sir L. Shadwell, V. C., held that a bequest to enable persons professing the Jewish religion to observe its rites was good.

The persons first relieved from the operation of the law against superstitious uses were Protestant Dissenters; for by the Toleration Act (1 Will. & Mary, c. 18), which was passed in 1688, and by certain subsequent statutes (see 53 Geo. 3, c. 160), *the schools and places for religious worship, education, and charitable purposes* of Protestant Dissenters were exempted from the operation of certain penal and disabling laws, to which they were previously liable. Subsequently to the Toleration Act, bequests in favour of various denominations of Dissenters, such as Quakers, Baptists and Irvingites, have been held valid. See *Attorney-General v. Hickman*, 2 Eq. Ca. Abr. 193, pl. 14; *Attorney-General v. Cock*, 2 Ves. 273; *West v. Shuttleworth*, 2 My. & K. 684; *Attorney-General v. Lawes*, 8 Hare, 32.

So likewise a bequest to Unitarian Chapels has been held good (*Shrewsbury v. Hornby*, 5 Hare, 406); for although persons denying the Trinity were, by a clause therein, expressly excluded from the protection of the Toleration Act, that clause was repealed by a subsequent act, 53 Geo. 3, c. 160.

In recent times, by 2 & 3 Will. 4, c. 115, which is retrospective (*Bradshaw v. Tasker*, 2 My. & K. 221),

except as to suits already commenced (*Attorney-General v. Todd*, 1 Keen, 803), Roman Catholics have been put upon the same footing, with respect to their schools, places for religious worship, education and charitable purposes, as Protestant Dissenters, subject, however, to the provisions of the Mortmain Act (9 Geo. 2, c. 36). The former statute, coming after the 10 Geo. 4, c. 7, which relieved Roman Catholics from personal disabilities, has very materially altered the law upon this subject. Accordingly, it has since been decided, that a legacy to be applied to the use of a Roman Catholic college (*Walsh v. Gladstone*, 1 Ph. 290), or of Roman Catholic priests (*Attorney-General v. Gladstone*, 13 Sim. 7; 1 Ph. 290), is valid.

In Ireland it has been held that the bequest of an annuity to the monks of a particular place, to provide clothing for the poor children attending their schools (*Carbery v. Cox*, 3 Ir. Ch. Rep., 231), and of another annuity to a parish priest to provide for the expense of an organ and organist of a Roman Catholic church, was good. *Ib.*

A bequest, however, for masses for the souls of deceased persons is, in England, still void, as being superstitious (*West v. Shuttleworth*, 2 My. & K. 684; *Heath v. Chapman*, 2 Drew. 417; but see *Re Michel's Trusts*, 28 Beav. 39). In Ireland, it seems, such bequests have been held not to be void as superstitious (*The Commissioners of Charitable Donations v. Walsh*, 7 Ir. Eq. Rep. 24, n.; *Read v. Hodgins*, *Ib.* 17; *sed vide Ex parte Felan v. Russell*, 4 Ir. Eq. Rep. 701; *Dillon v. Reilly*,

10 I. R., Eq. 152). And it has been recently decided that a bequest for masses is a "pious use" within sect. 16 of the Charitable Donations and Bequests Act, 7 & 8 Vict. c. 97. *Boyle v. Boyle*, 11 I. R., Eq. 433.

But it has been held in Ireland, that a bequest for the education and maintenance of priests of the order of St. Dominick, and a bequest for the redemption of the rent of a Roman Catholic church in Ireland, held by certain Dominican monks as trustees, were invalid, as contrary to the policy of 10 Geo. 4, c. 7 (The Roman Catholic Relief Act). *Sims v. Quinlan*, 16 Ir. Ch. Rep. 191; 17 Ir. Ch. Rep. 43.

Lastly, the Jews, with respect to their schools, places of worship, education, and charitable purposes and property, are put upon the same footing as Protestant Dissenters. See 9 & 10 Vict. c. 59, which is retrospective. *In re Michel's Trust*, 28 Beav. 39.

Where a gift made to *charitable purposes* is void as being superstitious, it becomes the duty of the crown, by sign manual, to appropriate it to valid charitable objects. *Cary v. Abbot*, 7 Ves. 490; *The Attorney-General v. Delaney*, 10 I. R., C. L. 104; and see *In re The Goods of Young*, 7 I. R., Eq. 218; *Da Costa v. De Pas*, Amb. 228; 2 Swanst. 487; *De Garcin v. Lawson*, 4 Ves. 433, n.

If a bequest, however, being void as superstitious, has no *charitable object*, the crown cannot apply it for charitable purposes, but it will go to the residuary legatees, or in case of intestacy, to the next of kin. See *West v. Shuttleworth*, 2 M. &

K. 684; *Heath v. Chapman*, 2 Drew. 417.

With regard to lands given to superstitious uses, since 1 Edw. 4, c. 14, it seems that they will go to the heir of the donor and not to the crown. See *Crofts v. Evetts*, Mo. 784; *The King and Queen v. Portington*, 2 Salk. 334; sed vide *Rex v. Lady Portington*, 1 Salk. 162.

A limitation over, however, in the event of a gift being void as contrary to public policy, or superstitious, will be good. *De Themminés v. De Bonneval*, 5 Russ. 288.

By the Roman Catholic Charities Act, 23 & 24 Vict. c. 134, dispositions for the benefit of Roman Catholic charities are not invalidated by the addition of superstitious or unlawful trusts, but the property given may be apportioned, and the part given to superstitious uses may be applied to lawful Roman Catholic charities (s. 1). See *Tudor's Charitable Trusts*, 32, 33, 34, 2nd ed.

Although the statutes relating to superstitious uses may not be imported into our colonies, gifts thereof to such uses in perpetuity, not being charitable, will, upon grounds of public policy, be invalid. Thus, the bequest of a house in Penang by a Chinese widow for the performance of religious ceremonies to her late husband and herself, was held to be void. See *Yeap Cheah Neo v. Ong Cheng Neo*, 6 L. R., P. C. C. 396.

II. *What Gifts to Charities by Deed are valid as complying with the Requisitions of the Statute 9 Geo. 2, c. 36, and subsequent Statutes modifying or altering its provisions.*

First, it will be observed that

under 9 Geo. 2, c. 36, deeds or assurances to charitable uses are required to be *indented*; but by 24 Vict. c. 9, such deeds or assurances *thereafter* made will not be void for not being or purporting to be indented. Sect. 1.

It may be also mentioned, that notwithstanding the words "by deed indented and enrolled" in the 1st section of the 9 Geo. 2, c. 36, copyholds are within this act. *Arnold v. Chapman*, 1 Ves. 108; *Doe d. Howson v. Waterton*, 3 B. & Ald. 149.

Next the deed must be delivered in the presence of two witnesses. Hence a deed attested by one witness, though executed and acknowledged, for the purpose of enrolment, in the presence of two persons who are parties to and execute the deed, but do not sign the attestation clause, is not a deed *sealed and delivered in the presence of two or more credible witnesses* within the meaning of the Statute of Mortmain (*Wickham v. Marquess of Bath*, 1 L. R., Eq. 17; 35 Beav. 59); and a deed so attested, executed by the grantor's sister and heiress-at-law after his decease, and purporting to confirm the grant, has been held to be invalid. *Ib.*

Although a deed of gift under sect. 1 be properly enrolled, yet if the grantor die within twelve calendar months from its execution it will be void (*Price v. Hathaway*, 6 Madd. 304); and will not, it seems, revoke a prior will. *Matthews v. Venables*, 2 Bing. 136; *S. C.* 9 Moore, 286.

So where a declaration of trust was executed by persons to whom a sum of money was given by a

donor upon trusts not excluding the acquisition of land, namely for the erection, establishment and support of a hospital, and the donor having died within twelve months after the execution of the deed, it was held that the gift was invalid. *Hawkins v. Allen*, 10 L. R., Eq. 246.

By 7 & 8 Vict. c. 37, however, deeds upon trust for the purposes of the education of the poor without valuable consideration are to be valid, although the donor die within twelve calendar months. Sect. 3.

Grants also of land by *absolute owners* or *tenants in tail*, for *sites of schools* for instruction of masters and mistresses of elementary schools for poor persons, are also to be valid, although the grantor die within twelve calendar months (12 & 13 Vict. c. 49, s. 4). And also grants to schools or colleges for the sons of yeomen, tradesmen and others, or for the theological training of candidates for holy orders. 15 & 16 Vict. c. 49.

Next, it will be observed, that a conveyance made as required by the act, must be enrolled within six calendar months after execution.

It has been decided that it will be sufficient if the grantor has executed it, although the grantees may not have done so before enrolment (*Grievess v. Case*, 2 Cox, 301), and although the grantor retain possession of the deed afterwards. *Attorney-General v. Munby*, 1 Mer. 327; *Fisher v. Brierley*, 10 H. L. Ca. 159.

If the deed be not duly enrolled, the grantor may himself take advantage of the want of compliance with the requisitions of the act and

recover the property. *Doe d. Wel-lard v. Hawthorn*, 2 B. & Ald. 96; *Doe d. Preeee v. Howells*, 2 B. & Ad. 744; *Att.-Gen. v. Munby*, 1 Mer. 327; *Fisher v. Brierley*, 1 De G., F. & J. 643. See also *Doe v. Wrighte*, 2 B. & Ald. 710.

The Courts will not presume the enrolment of a deed even after a considerable period has elapsed since its execution. *Doe d. How-son v. Waterton*, 3 B. & Ald. 149; *Wright v. Smithies*, 10 East, 409.

But it seems that they are not bound upon public policy to take the objection of the absence of enrolment, if the party legally entitled to the property does not insist upon it. *Att.-Gen. v. Ward*, 6 Hare, 477; *Att.-Gen. v. Moor*, 20 Beav. 119.

As to the mode of proving an enrolment, see *Doe d. Williams v. Lloyd*, 1 Scott, N. R., 505; 1 Man. & Gr. 671.

Where lands are already in mortmain under a deed duly enrolled, whether they are vested in a corporation (*Walker v. Richardson*, 2 Mees. & W. 882; *Att.-Gen. v. Glyn*, 12 Sim. 84) or individuals (*Ashton v. Jones*, 28 Beav. 460), a subsequent deed conveying such lands to another charity will *not* require enrolment. See also *In re The London Dock Act*, 20 Beav. 490.

But the enrolment of a deed by which land is purchased for charitable uses is necessary, although the purchase-money arises from the sale of lands already in mortmain. See *Re The Governors of Christ's Hos-pital*, 12 W. R. 669.

A purchase of land by overseers and churchwardens for the purpose of a workhouse does not require en-

rolment, as the statutes 59 Geo. 3, c. 12, s. 8, and 9 Geo. 1, c. 7, enabled parishes to take lands in fee for building workhouses, and the purchase of land for such purpose is not for a charitable use within the meaning of the statute of Elizabeth. *Burnaby v. Barsby*, 4 H. & N. 690.

With regard to the acknowledgment of a deed to charitable uses before enrolment, it has been enacted by 24 Vict. c. 9, "that no deed, assurance or instrument *thirty years old*; nor any deed, assurance or instrument heretofore executed, as to which it shall be proved to the satisfaction of the clerk of enrolments in Chancery that the *acknowledgment thereof* by the grantor of the lands or hereditaments to which the same relates cannot be obtained within twelve calendar months after the passing of this act (24 Vict. c. 9), shall, for the purposes of the first-recited act (9 Geo. 2, c. 36), or of this act, require acknowledgment prior to enrolment." Sect. 5.

Afterwards, by 25 & 26 Vict. c. 17, it was enacted that, "no deed, assurance or instrument executed previously to the passing of the said act (24 Vict. c. 9) shall, for the purposes thereof, require acknowledgment prior to enrolment." Sect. 3.

By statute 31 & 32 Vict. c. 44, s. 3, it is enacted that, "from and after the passing of this act, it shall not be necessary to acknowledge any deed or instrument in order that the same may be enrolled in Her Majesty's High Court of Chancery." Sect. 3.

It will be observed that by 9 Geo. 2, c. 36, s. 1, no gift or con-

N N

T.L.C.

veyance for charitable uses will be valid unless the same be made to take effect *in possession*.

An exception to this enactment has been introduced by statute 26 & 27 Vict. c. 106, whereby, after reciting 24 & 25 Vict. c. 9; 9 Geo. 2, c. 36; and 25 & 26 Vict. c. 17, it is enacted that, "every deed or assurance by which any land shall have been demised for any term of years for any charitable use, shall, for all the purposes of the said recited acts, be deemed to have been made to take effect for the charitable use thereby intended immediately from the making thereof, if the term for which such land shall have been thereby demised was thereby made to commence and take effect in possession at any time *within one year* from the date of such deed or assurance."

Next it will be observed, that a gift to charitable uses must be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever for the benefit of the donor or grantor, or of any person claiming under him.

Even where there is a resulting trust to the grantor during his life, in consequence of no trust being declared for the charity during that period, the grant will be void as not being "to take effect in possession for the charitable use immediately from the making thereof." *Limbrey v. Gurr*, 6 Madd. 151.

But it is not necessary that possession *de facto* should be had, if the deed executed under 9 Geo. 2, c. 36, be made to take effect so as to give a title to the immediate

possession of the land. *Fisher v. Brierley*, 10 H. L. Ca. 159.

The donor may, it seems, without rendering his gift invalid, reserve to himself the power of regulating the charity (*Grievs v. Case*, 2 Cox, 301); and a condition by which a vault and tomb is to be repaired and to be used for the grantor and his family, is not a reservation rendering a conveyance invalid within the meaning of the act, "the object of the act only being to prevent a reservation, under colour of a charitable use, of some substantial benefit to the donor himself." *Doe d. Thompson v. Pitcher*, 3 Mau. & Sel. 407, 410; 2 Marsh. 61; 6 Taunt. 359.

A grant, moreover, by indenture executed more than twelve months before the grantor's death, and duly enrolled, of a house and premises held under a church lease, to Trinity College, Cambridge, in trust for the rector of a parish, was held by Sir William Grant, M. R., to be valid under the statute, and not to be affected by the circumstance of the grantor being himself at the time of the grant rector of the parish, and retaining the deed in his own possession. *Att.-Gen. v. Munby*, 1 Mer. 327.

Although all the requisitions of the statute are apparently complied with by the grantor, nevertheless if there be an agreement or understanding or design among the parties to the deed, that the payment of the income is not to be enforced during the life of the grantor, the deed will be void, as the whole transaction will be considered as a fraud upon the statute. See *Wick-*

ham v. Marquess of Bath, 1 L. R., Eq. 17; 35 Beav. 59.

The onus, however, of proving such an agreement or understanding or design rests on those who allege it as plaintiffs (*Way v. East*, 2 Drew. 44; see also *Doe d. Thompson v. Pitcher*, 3 Mau. & S. 407; and *Fisher v. Brierley*, 10 H. L. Ca. 159, affirming the decision of the Lords Justices, reported 1 De G., F. & J. 643, who reversed the decision of Sir J. Romilly, M. R.), where it was held that the evidence did not show any secret understanding between the donor and trustees.

The law upon the subject of reservations in the case of assurances made to charities has been recently modified by 24 Vict. c. 9, which enacts "that no deed or assurance *hereafter* to be made for any charitable uses whatsoever, of any hereditaments of any tenure whatsoever, or of any estate or interest therein, shall be deemed to be null and void within the meaning of the first recited act (9 Geo. 2, c. 36), by reason of such deed or assurance, or any deed forming part of the same transaction, containing any grant or reservation of any peppercorn or other nominal rent, or of any mines or minerals, or easement, or any covenants or provisions as to the erection, repair, position, or description of buildings, the formation or repair of streets or roads, drainage or nuisances, or any covenants or provisions of the like nature, for the use and enjoyment as well of the hereditaments comprised in such deed or assurance as of any other adjacent or neighbouring hereditaments, or any right of entry on nonpayment

of any such rent, or on breach of any such covenant or provision, or any stipulations of the like nature for the benefit of the donor or grantor, or of any person or persons claiming under him, nor (in the case of any such assurance of hereditaments of copyhold or customary tenure, or of any estate or interest therein) by reason of the same not being made by deed, *nor in the case of such assurances made bond fide on a sale for a full and valuable consideration*, by reason of such consideration consisting wholly or partly of a rent, rent-charge or other annual payment reserved or made payable to the vendor or to any other person, with or without a right of re-entry for nonpayment thereof: *provided always*, that in all reservations authorized by this act, the donor, grantor or vendor shall reserve the same benefits for his representatives as for himself." Sect. 1.

The second section of the Mortmain Act was, it seems, suggested by the case of Queen Anne's Bounty, and other existing charities, where money was from time to time to be laid out in purchasing lands. *Att.-Gen. v. Day*, 1 Ves. 222; *Vaughan v. Farrer*, 2 Ves. 188; *Price v. Hathaway*, 6 Madd. 313.

The meaning of the second section, which relates to purchases, is, that they should not be precarious in point of time; so that should the grantor of any land die within twelve months, or the transferor of stock die within six months, yet the person who *paid* the money should not lose his purchase or be put to the risk of recovering it back, as there might not be assets, or stocks

might fall. *Att.-Gen. v. Day*, 1 Ves. 222.

But it was not intended to leave every person at liberty within twelve months before his death to give to charitable uses any land which within twelve months he had purchased for full and valuable consideration. See *Price v. Hathaway*, 6 Madd. 304.

In order to bring the case within the second section the consideration must be paid by the person for whose benefit the conveyance is made (*Doe d. Preeee v. Howells*, 2 B. & Ad. 744). And the purchase must be bonâ fide and for full and valuable consideration, otherwise it will be void. *Doe d. Wellard v. Hawthorn*, 2 B. & Ald. 96; *Att.-Gen. v. Ward*, 6 Hare 477.

It seems to have been doubtful whether a conveyance of land to charitable uses was void when made subject to a perpetual rent-charge, even though it may have been fully equal to the value of the land. In the case of the Manchester Infirmary, an act of parliament was obtained in order to remove that objection (*Boyle on the Law of Charities*, 117; 1 Evans, Statutes, 327, n. 5); but by 24 Vict. c. 9, it is enacted, that assurances to charitable uses made bonâ fide on a sale for a full and valuable consideration shall not be deemed void by reason of the consideration consisting wholly or partly of a rent, rent-charge, or other annual payment reserved or made payable to the vendor or any other person, with or without a right of re-entry for non-payment thereof (sect. 1), the vendor reserving the

same benefits to his representatives as to himself. *Ib.*

As it was doubtful whether the enactment in sect. 1 of 24 Vict. c. 9, as to assurances to be thereafter made bonâ fide on a sale, referred to any hereditaments not of copyhold or customary tenure, it was by a subsequent act declared and enacted, "that the said enactment comprises and extends to all hereditaments, whether of freehold, customary, or copyhold tenure, and to every estate and interest therein" (25 & 26 Vict. c. 17, s. 2).

By stat. 27 & 28 Vict. c. 13, after reciting 24 & 25 Vict. c. 9, and 25 & 26 Vict. c. 17, it is enacted that "every full and bonâ fide valuable consideration within the first section of the said first act which shall consist either wholly or partly of a rent, or other annual payment reserved or made payable to the vendor or grantor, or to any other person, shall for the purposes of stat. 9 Geo. 2, c. 36, be as valid and have the same force and effect as if such consideration had been a sum of money actually paid at or before the making of such conveyance, without fraud or collusion." Sect. 4.

The operation of the second section of 9 Geo. 2, c. 36, has been still further extended by 25 Vict. c. 17, which enacts, that "in all cases in which money shall have been really and bonâ fide expended before the passing of this act, in the substantial and permanent improvement, by building or otherwise, for any charitable use, of land of any tenure whatsoever, of which possession is now held by virtue of

any deed or assurance conveying or purporting to convey the same, or declaring any trusts or trust thereof for such charitable use, all money so expended shall be deemed, for the purposes of the said act, equivalent to money actually paid by way of consideration for the purchase of the said land." Sect. 5.

Although the second section of the Mortmain Act was only intended to prevent such purchases as are there mentioned from being avoided by reason of the death of the grantor within twelve calendar months after the sealing and delivery thereof, it seems notwithstanding to have been generally apprehended that it was intended wholly to exempt such purchases from the operation of the act, and, in consequence thereof, the formalities prescribed by the act, in relation to the conveyance of hereditaments to charitable uses, were in many instances omitted in purchases for a full and valuable consideration. In order to remedy the defects in the titles of lands which consequently arose, it was enacted by 9 Geo. 4, c. 85 (which was purely retrospective), that where lands, tenements or hereditaments had been purchased for full and valuable consideration for charitable uses, deeds of conveyances executed before the 25th July, 1828, were to be valid, although the formalities prescribed by 9 Geo. 4, c. 36, had not been observed. See *Doe d. Graham v. Hawkins*, 1 Gale & D. 551.

Roman Catholic charities having to a great extent been kept secret, it was by 23 & 24 Vict. c. 134, s. 3, enacted that deeds or assurances

relating thereto should not be void if enrolled within twelve months from the passing of the act. Sect. 3.

Conveyances, however, for *valuable consideration*, upon trust for the *education of the poor*, and not enrolled, are rendered valid if enrolled within twelve calendar months from the passing of 4 & 5 Vict. c. 38, s. 16 (21 June, 1841).

By 24 Vict. c. 9, the legislature again interfered in favour of purchasers to charitable uses, giving them twelve calendar months from the passing of the act (*i.e.* twelve calendar months after the 17th May, 1861), to enrol their deeds (sect. 3); and by a subsequent act (25 & 26 Vict. c. 17) the time was extended to the 17th May, 1863 (sect. 3); and by 27 & 28 Vict. c. 13, to the 17th of May, 1866 (sect. 1).

Provisions as to *enrolment* are made where there may be *two deeds thereafter* made, one conveying lands, and the other declaring the charitable uses on such conveyance. See 24 Vict. c. 9, which enacts that "in all cases where the charitable uses of any deed or assurance *hereafter* to be made for conveyance of any hereditaments for any charitable uses shall be declared by any separate or other deed or instrument, it shall not be necessary, for the purposes of the first recited act (9 Geo. 2, c. 36), or of this act (24 Vict. c. 9), to enrol such deed or assurance for conveyance, but every such deed or assurance for conveyance shall nevertheless be absolutely null and void, unless such separate or other deed or instrument shall, within six calendar months next after the

making or perfecting of such deed or assurance for conveyance, be enrolled in Her Majesty's High Court of Chancery, and such enrolment as last aforesaid shall be deemed and treated for all purposes of the first recited act (9 Geo. 2, c. 36), and of this act (24 Vict. c. 9), as if such deed or assurance for conveyance had declared such charitable uses, and had been so enrolled as last aforesaid." Sect. 2.

Provisions are next made, where two such deeds have *already* been executed, declaring the validity of the enrolment of the deed declaring the charitable trusts, and extending the time for enrolment, if none had taken place. See 24 Vict. c. 9, which enacts that "in all cases where the charitable uses of any deed or assurance *heretofore* made for conveyance of any hereditaments for any charitable uses *upon* such *full and valuable consideration* as aforesaid, and under which possession is now held for such uses, have been declared by any separate or other deed or instrument, and such deed or assurance for conveyance has not been enrolled in Her Majesty's High Court of Chancery prior to the passing of this act; but such separate or other deed or instrument has been so enrolled, such enrolment shall be deemed and treated for all purposes of the first recited act (9 Geo. 2, c. 36), and of this act (24 Vict. c. 9), as if such deed or assurance for conveyance had declared such charitable uses, and had been so enrolled as last aforesaid; but if neither of such deeds nor such instrument has been so enrolled, then it shall not be

necessary for the purposes of the first recited act (9 Geo. 2, c. 36), or of this act (24 Vict. c. 9), to enrol such deed or assurance for conveyance, but every such deed or assurance for conveyance shall, nevertheless, be absolutely and to all intents and purposes null and void, unless such separate or other deed or instrument shall, within twelve calendar months next after the passing of this act, be so enrolled, and such enrolment as last aforesaid shall be deemed and treated for all the purposes of the first recited act (9 Geo. 2, c. 36), and of this act (24 Vict. c. 9), as if such deed or assurance for conveyance had declared such charitable uses, and had been so enrolled as last aforesaid." Sect. 4.

Subsequently, by 25 & 26 Vict. c. 17, after reciting that it is by the 4th section of 24 Vict. c. 9 enacted, that where the charitable uses of any such deed or assurance for conveyance as is therein mentioned had been declared by any separate deed or instrument, then, if neither of the said deeds or instruments had been enrolled, it should not be necessary to enrol such deed or assurance for conveyance, but every such deed or assurance for conveyance should be void unless such other separate deed or instrument should be enrolled within such time as therein mentioned; and after reciting that it may happen that such deed or assurance for conveyance may have been executed before the passing of the said act, but the separate deed or instrument declaring the charitable uses may not have been executed until after the passing of

the said act, it was, therefore, enacted that "the said act and this act shall be taken to apply as well to cases where such separate deed or instrument shall be or shall have been executed after, as to cases where it may have been executed *before*, the passing of the said act; provided only, that if not already executed, it be executed six months next after the passing of this act." Sect. 4.

Afterwards, by stat. 27 & 28 Vict. c. 13, after reciting 24 Vict. c. 9 and stat. 25 & 26 Vict. c. 17, it is enacted that "this act shall be taken to apply as well to cases where such separate deed or instrument as is mentioned in the 4th section of the said second act shall be or shall have been executed after, as to cases where it may have been executed *before*, the passing of the said first act; provided only, that if not already executed, it be executed within six calendar months next after the passing of this act." Sect. 2.

Power was next given to the Court of Chancery in certain cases to order the enrolment of deeds relating to charitable trusts where the original deed has been lost or destroyed by time or accident. See 27 & 28 Vict. c. 13, whereby after reciting that "it may be impossible in some cases to enrol the original deed creating a charitable trust by reason of the same having been lost or destroyed by time or accident, but nevertheless the trusts of such charity may sufficiently appear by some subsequent deed appointing new trustees, or otherwise reciting the trusts created by the original deed:" it is enacted, that

"in every such case it shall be lawful for any trustee or other person interested in such charitable trust to apply by summons in a summary way to the Court of Chancery for an order authorizing the enrolment of such subsequent deed; and if the Court shall be satisfied by affidavit or otherwise that such original deed has been lost or destroyed by time or accident, but that the trusts thereof sufficiently appear by such subsequent deed, then it shall be lawful for the said Court to make an order authorizing the enrolment of such subsequent deed; and the enrolment thereof shall have the same force and effect as the original deed would have had if the same had not been lost or destroyed as aforesaid." Sect. 3.

Subsequently power was given to the Court of Chancery under certain circumstances to enrol an original deed that ought to have been enrolled as well as a subsequent deed when the original one has been lost or destroyed by time or accident. See 29 & 30 Vict. c. 57, whereby, after reciting 9 Geo. 2, c. 36; 24 Vict. c. 9; 25 & 26 Vict. c. 17, and 27 & 28 Vict. c. 13, it is enacted that "any trustee, governor, director, or manager of any charity, or any other person entitled to act in the management of or otherwise interested in any charitable trust, may by summons in a summary way, and without service thereof upon any person, apply to the Court of Chancery for an order authorizing the enrolment in the Court of any deed, assurance, or other instrument whereby any hereditaments of any tenure or any estate or interest

therein have or has been or *shall* be given, granted, or in any way conveyed, settled, or charged for charitable uses, or of any other deed, assurance, or instrument relative to or connected with any charitable trust, and which deed assurance or instrument ought to have been enrolled, but has not been enrolled within the time by law limited for that purpose, or (where such deed, assurance, or instrument has been lost or destroyed by time or accident, and the trusts thereof sufficiently appear by some subsequent deed appointing new trustees, or otherwise reciting the trusts created by the original deed, assurance, or instrument) for an order authorizing the enrolment of such subsequent deed." Sect. 1.

"If the Court should be satisfied by affidavit or otherwise that the deed, assurance, or other instrument conveying or charging the hereditaments, estate or interest for charitable uses was made really *and bona fide* for full and valuable consideration, actually paid at or before the making or perfecting thereof, or reserved by way of rent-charge or other annual payment, or partly paid at or before the making or perfecting of such deed, assurance, or other instrument, and partly reserved as aforesaid, without fraud or collusion, and that at the time of the application to the Court possession or enjoyment is held under such deed, assurance, or other instrument, and that the omission to enrol the same in proper time has arisen from mere ignorance or inadvertence, or from the destruction thereof by time or accident, it shall

be lawful for the Court to make an order authorizing the enrolment in the Court of the deed, assurance, or instrument to which the application relates, or of such subsequent deed, as the case may be, and the same shall thereupon be enrolled accordingly at any time within six calendar months from the date of the order, and no acknowledgment shall be necessary prior to enrolment." Sect. 2.

"Every enrolment made pursuant to an order of the Court under this act shall, notwithstanding anything in the first-mentioned act contained, have the same force and effect which by the second-mentioned act, as explained and amended by the two subsequent acts before mentioned, is given to the enrolment of a deed, assurance, or other instrument, or of a subsequent deed, by the three last-mentioned acts respectively authorized to be enrolled and duly enrolled according to the provisions thereof, and within the time thereby respectively limited." Sect. 3.

"Provided always, that nothing herein contained shall affect or apply to any deed, instrument or assurance as to which at the time of any such application to the Court of Chancery any action, suit or proceeding shall be pending for setting aside the same or for asserting any right founded on the invalidity thereof, or any decree or judgment shall have been then already obtained founded on such invalidity." Sect. 4.

A similar order may now be obtained from the Clerk of Enrolments in Chancery, under a subsequent act, 35 & 36 Vict. c. 24,

which, after reciting 29 & 30 Vict. c. 57, enacts that "from and after the passing of this act (27th June, 1872), if the clerk of enrolments in Chancery for the time being shall be satisfied, by affidavit or otherwise, that the deed, assurance, or other instrument conveying or charging the hereditaments, estate or interest for charitable uses was made really and bonâ fide for *full and valuable consideration actually paid at or before the making* or perfecting thereof, or reserved by way of rent-charge or other annual payment, or partly paid at or before the making or perfecting of such deed, assurance, or other instrument, and partly reserved as aforesaid, without fraud or collusion, and that at the time of the application to the said clerk of enrolments possession or enjoyment is held under such deed, assurance, or other instrument, and that the omission to enrol the same in proper time has arisen from ignorance or inadvertence, or from the destruction thereof by time or accident, it shall be lawful for the said clerk of enrolments to enrol the deed, assurance, or instrument to which the application relates, or such a subsequent deed as in the act mentioned, as the case may be, and the same shall thereupon be enrolled accordingly, and such enrolment shall be as valid and effective for all purposes as if the same had been made under the authority of the said last-mentioned act. Over and above the ordinary fee payable upon the enrolment of any deed, assurance, or other instrument, there shall be paid upon the enrolment, under this section, of any deed, assurance, or other instrument

the further fee of ten shillings." Sect. 13.

III. *What Gifts by Will are invalid as being either Realty or savouring of Realty.*

All wills executed before, unless re-published after, the passing of (*Willet v. Sandford*, 1 Ves. 178, 185,) the Mortmain Act, by testators who died afterwards, whereby lands were devised to charitable purposes, are valid (*Ashburnham v. Bradshaw*, 2 Atk. 36; *Att.-Gen. v. Andrews*, 1 Ves. 225). But all devises to charitable purposes made by wills dated or re-published after the passing of the act, whether of freeholds, copyholds (*Arnold v. Chapman*, 1 Ves. 108), or leaseholds (*Att.-Gen. v. Tomkins*, Amb. 216; *Johnston v. Swann*, 3 Madd. 457; *Paice v. Archbishop of Canterbury*, 14 Ves. 364; *Entwistle v. Davis*, 4 L. R., Eq. 272, 277), or of the rents and profits of (*Thornber v. Wilson*, 3 Drew. 245; *Cramp v. Playfoot*, 4 K. & J. 479), or of crops growing on, lands (*Symonds v. Marine Society*, 2 Giff. 325), are void.

The act has, at any rate until recently, received a very strict construction, and any personalty savouring of realty has been held to come within the meaning of the first section of the act. Thus, a legacy of money to arise from the sale of land (*Curtis v. Hutton*, 14 Ves. 537; *Page v. Leapingwell*, 18 Ves. 463; *Trustees of the British Museum v. White*, 2 S. & S. 595; *Att.-Gen. v. Lord Weymouth*, Amb. 20; *Paice v. Archbishop of Canterbury*, 14 Ves. 364; *Att.-Gen. v. Harley*, 5 Madd. 321; *Waite v. Webb*, 6 Madd. 71; *Thorn-*

ber v. Wilson, 3 Drew. 245; 4 Drew. 350; *The Incorporated Church Building Society v. Coles*, 5 De G., Mac. & G. 331; *Robinson v. Robinson*, 19 Beav. 494; *Graham v. Paternoster*, 31 Beav. 30, is void, even although the conversion may have been directed by a former instrument. *Middleton v. Spicer*, 1 Bro. C. C. 201; *Att.-Gen. v. Harley*, 5 Madd. 321; *Aspinall v. Bourne*, 29 Beav. 462; and see *Brook v. Badley*, 3 L. R., Ch. App. 672; 4 L. R., Eq. 106, overruling *Shadbolt v. Thornton*, 17 Sim. 49, more fully reported 13 Jur. 597; *Marsh v. Att.-Gen.* 2 J. & H. 61; 30 L. J., N. S., Ch. 233; 7 Jur., N. S. 184.

A legacy payable out of *personalty* and of the *proceeds of the sale of an estate*, is an interest in land within the Statute of Mortmain, and cannot, while it remains unpaid, be bequeathed by the legatee for charitable purposes (*Brook v. Badley*, 3 L. R., Ch. App. 672); nor can there be any apportionment, so as to make that part of the legacy which would be payable out of the personalty available for the charitable bequest. *Ib.*

Although a devise of rents of realty to accrue due would clearly be within the act, a bequest of arrears of rent will not (*Edwards v. Hall*, 11 Hare, 6; 6 De G., Mac. & G. 74; *Thomas v. Howell*, 18 L. R., Eq. 198). But a bequest of the arrears of interest on a mortgage has been held to be within the act, "for the land might be sold to pay them." *Alexander v. Brame*, 7 De G., Mac. & G. 525, 542; 7 Jur., N. S. 889.

A bequest to a charity of money to be laid out in the purchase of

land is clearly void, even although the trustees have power to invest upon personal securities until a suitable purchase can be made (*Att.-Gen. v. Heartwell*, 2 Eden, 234; *Grieves v. Case*, 4 Bro. C. C. 67; 1 Ves. jun. 548; 2 Cox, 301; *Pritchard v. Arbouin*, 3 Russ. 458; *Mann v. Burlingham*, 1 Keen, 235; *Att.-Gen. v. Hodgson*, 15 Sim. 146; and see *English v. Orde*, Duke's Char. Uses, by Bridg. 432); and a recommendation to trustees to purchase has been held to be mandatory, and therefore void. *Att.-Gen. v. Davies*, 9 Ves. 546; *Kirkband v. Hudson*, 7 Price, 212; *Pilkington v. Boughey*, 12 Sim. 114.

A bequest of money for the erection (*Brodie v. Duke of Chandos*, 1 Bro. C. C. 444, n.; *Att.-Gen. v. Bishop of Oxford*, 1 Bro. C. C. 444, n.; *Glubb v. Att.-Gen.*, Amb. 373; *Att.-Gen. v. Parsons*, 8 Ves. 186; *Att.-Gen. v. Munby*, 1 Mer. 327; *Fisher v. Brierly*, 1 De G., F. & J. 643; *Seuwell v. Crew-Read*, 3 L. R., Eq. 60) or repair and improvement (*Harris v. Barnes*, Amb. 651; *Att.-Gen. v. Bishop of Chester*, 1 Bro. C. C. 444) of buildings upon land already in mortmain is valid. And evidence is admissible to show that the testator contemplated land in mortmain. *Att.-Gen. v. Hyde*, Amb. 751; *Giblett v. Hobson*, 3 M. & K. 517; *Cresswell v. Cresswell*, 6 L. R., Eq. 69.

A bequest, however, for paying off an incumbrance on real estate belonging to a charity, as, for instance, a meeting-house, is invalid (*Corbyn v. French*, 4 Ves. 418), though the incumbrance be merely equitable (*Waterhouse v. Holmes*, 2 Sim. 162; and see *Davies v.*

Hopkins, 2 Beav. 276); but a bequest for paying off debts contracted in respect of a meeting-house, but which do not constitute a charge upon it, is valid. *Bunting v. Marriott*, 19 Beav. 163.

Where a testator bequeaths money to be laid out in erecting, building, or founding a church, chapel, school, or other charitable institution, it will be implied that he intended a purchase of land to be made for that purpose, and the gift will consequently be void (*Foy v. Foy*, 1 Cox, 163; *Att.-Gen. v. Nash*, 3 Bro. C. C. 588; *Att.-Gen. v. Whitechurch*, 3 Ves. 144; *Chapman v. Brown*, 6 Ves. 404; *Att.-Gen. v. Parsons*, 8 Ves. 186; *Att.-Gen. v. Davies*, 9 Ves. 535; *Pritchard v. Arbouin*, 3 Russ. 458; *Smith v. Oliver*, 11 Beav. 481; *Att.-Gen. v. Hodgson*, 15 Sim. 146; *Hopkins v. Phillips*, 3 Giff. 182); and the rule of the Court is now well settled, that in order to validate a bequest of this kind, you must find in the will a reference to an existing site on which the building contemplated shall be erected, or you must find words expressly excluding the application of the money given in the acquisition of land (*Pritchard v. Arbouin*, 3 Russ. 458; *Sewell v. Crew-Read*, 3 L. R., Eq. 60; *Hawkins v. Allen*, 10 L. R., Eq. 246; *In re Watmough's Trusts*, 8 L. R., Eq. 272, and the remarks therein on *Booth v. Carter*, 3 L. R., Eq. 757; *Lucas v. Jones*, 4 L. R., Eq. 73; *Pratt v. Harvey*, 12 L. R., Eq. 544; *In re Cox*, *Cox v. Davie*, 7 Ch. D. 204). Even a request to the trustees of the sum bequeathed for such purposes, that they would ask for a grant of land for the purposes

of the building, has been held not to be sufficient to express the testator's intention to exclude a purchase of land (*Mather v. Scott*, 2 Keen, 172). And where money is bequeathed to a charity "towards building" charitable institutions, the mere fact that the charity may possess land upon which such buildings might be erected will not render the bequest valid, unless the testator by his will precludes the application of the legacy to the purchase of other building land. *Giblett v. Hobson*, 5 Sim. 651; 3 My. & K. 517.

A bequest of this kind will, however, be good provided the land on which the building is to be erected cannot, consistently with the terms of the trust, be acquired by means of any portion of the bequest, but either has been or is to be lawfully dedicated for the purpose. Thus it has been held by the House of Lords that a bequest of money to be employed in buildings for a charitable object, *if land shall at some future limited time be given for that purpose*, but no part of the sum bequeathed was to be applied in the purchase of land, is a perfectly valid bequest. *Att.-Gen. v. Philpott*, 6 H. L. Ca. 338, reversing the decision of Sir J. Romilly, M. R., reported 21 Beav. 134, and overruling *Trye v. Corporation of Gloucester*, 14 Beav. 173; and see *Henshaw v. Atkinson*, 3 Madd. 306; *Carwood v. Thompson*, 1 Sm. & Giff. 409; *Baldwin v. Baldwin*, 22 Beav. 413 (No. 1); *Dent v. Allcroft*, 30 Beav. 335; *Cresswell v. Cresswell*, 6 L. R., Eq. 69; *Chamberlayne v. Brockett*, 8 L. R., Ch. App. 206.

And it has also been held that a bequest for the enlargement of a parish church (*Re Hawkins Trust*, 33 Beav. 570), or for the endowment of future churches or chapels (*Sinnett v. Herbert*, 7 L. R., Ch. App. 232, reversing *S. C.* reported 12 L. R., Eq. 201) is good.

A bequest, however, of a legacy to the trustees of a charitable institution, on condition of their providing land for building houses to be dedicated to charity, has been held void, for it was said that "it is an absurd distinction that a testator shall not give land to a charity, but he may give money in consideration of another's giving land for a charity." *Att.-Gen. v. Davies*, 9 Ves. 535, 543; and see *Dunn v. Bownas*, 1 K. & J. 602.

A bequest of money to be employed on land devised by the testator to a charity, is invalid. *Att.-Gen. v. Hinxman*, 2 J. & W. 270; *Smith v. Oliver*, 11 Beav. 481; *Cramp v. Playfoot*, 4 K. & K. 479; *Green v. Britten*, 42 L. J., Ch. 187.

Some expressions of an ambiguous character have been held by themselves not to point to the acquisition of land, and therefore not to render the bequest, which can be carried out in a legal manner, invalid. Thus a direction to apply the *dividends* of stock "for or towards establishing a school" (*Att.-Gen. v. Williams*, 4 Bro. C. C. 526; 2 Cox, 387; and see *Martin v. Welstead*, 23 L. J., Ch. 927); or a bequest of an *annual sum* "to establish a school for educating poor children" (*Hartshorne v. Nicholson*, 26 Beav. 58); for "the perpetual endowment and main-

tenance of two schools" (*Kirkbank v. Hudson*, 7 Price, 212); for the endowment of existing churches and chapels (*Edwards v. Hall*, 11 Hare, 1; 6 De G., Mac. & G. 74); or the bequest of the *income* of a sum of money for *providing* a "school-house" (*Johnston v. Swann*, 3 Madd. 457; *Crafton v. Frith*, 15 Jur. 737; 20 L. J., Ch. 198), have been held good, because the bequests might be carried out in a legal mode, not necessarily involving the purchase of land.

Where, however, a *sum of money*, and not merely income, was left towards *establishing* a school at a certain place, provided a further sum could be raised in aid thereof if found necessary, the bequest was held to be invalid, as it appeared to be the intention that land should be purchased and a building erected for the purpose of the proposed school. *Att.-Gen. v. Hull*, 9 Hare, 647; see also *Att.-Gen. v. Hodgson*, 15 Sim. 146; *Longstaff v. Remison*, 1 Drew. 28; *Re Clancy*, 16 Beav. 295; *Dunn v. Bownas*, 1 K. & J. 596.

So in *Tatham v. Drummond*, 4 De G., Jo. & Sm. 484, where a sum of money was bequeathed to *The Society for the Prevention of Cruelty to Animals*, to be applied as the committee should "think best towards the establishment in the neighbourhood of London or Westminster of slaughterhouses, away from the densely populated places in which they are now situated, and for the relief of and protection from cruelty to the animals taken to be slaughtered," it was held by Lord Westbury, L. C., reversing the de-

cision of Sir W. Page Wood, V. C., (reported 12 W. R. (V. C. W.) 620) that the bequest was void, as being within 9 Geo. 2, c. 36. "The word 'establishment,'" said his lordship, "involves this idea of putting the charity on a permanent footing. It points to the purchase of sites of land, and the erection of permanent buildings, and it cannot be doubted that if there were no Statute of Mortmain, a bequest to establish a charity, such as a school or hospital, in any parish or district would be carried into effect by the purchase of land and the erection of buildings thereon."

The result will be otherwise where it appears from the general scope of the will to have been the intention of the testator that no part of the fund was to be employed in building. *Att.-Gen. v. Williams*, 2 Cox, 387; *Hill v. Jones*, 2 W. R. 657.

Where trustees for a charity have an option to lay money out in an objectionable or unobjectionable manner, as, for instance, in the purchase of land or upon government or personal security (*Sorresby v. Hollins*, 9 Mod. 221; *Grimmett v. Grimmett*, Amb. 210; *Widmore v. Woodroffe*, 1 Bro. C. C. 13, n.; *Att.-Gen. v. Parsons*, 8 Ves. 186); in the purchase of land in England or Ireland, in the last of which countries the Statute of Mortmain is not in force (*The University of London v. Yarrow*, 1 De G. & Jo. 72); in erecting or endowing a church (*Edwards v. Hall*, 11 Hare, 1, 6 De G., M. & G. 70; *Sinnett v. Herbert*, 7 L. R., Ch. App. 232), the bequest will be valid: or

in establishing, endowing, maintaining and keeping up a school at a particular place or otherwise for school purposes (*Dent v. Allcroft*, 30 Beav. 335). So where the bequest was "to support or found a school." *In re Hedgman*, 8 Ch. D. 156.

So where a testator directed his trustees to invest his personal estate upon "real securities," with full power "to change the securities or funds," and he bequeathed a part to a charity, it was held by Sir John Romilly, M. R., that the discretion as to the mode of investment rendered the charitable gift valid. *Graham v. Paternoster*, 31 Beav. 30; *Re Beaumont's Trusts*, 32 Beav. 191.

Upon the same principle, a bequest of stock to a municipal corporation to be "applied in such manner and for such purposes as the said corporation should judge to be most for the benefit and ornament of their town," was held not to be void under the Mortmain Act. *The Mayor of Faversham v. Ryder*, 5 De G., Mac. & G. 350; 18 Beav. 318; *Salisbury v. Denton*, 3 K. & J. 529; see also *Baldwin v. Baldwin*, 22 Beav. 419.

And where an option is given to trustees as to the charities to which personalty, both pure and impure, is to be given, they may exercise their option by giving the impure personalty to charities exempted from the Statute of Mortmain, and by giving the pure personalty to other charities within the Mortmain Act. *Lewis v. Allenby*, 10 L. R., Eq. 668.

A bequest of pure personalty to an existing charity, the application

of the funds of which rests in the absolute discretion of the trustees thereof, is good, although some of the objects of the charity may involve the acquisition of land. *Wilkinson v. Barber*, 14 L. R., Eq. 96.

A direction, however, by an English testator that money given to a charity is "to be placed out at interest on mortgage security," will render the bequest invalid, inasmuch as the Court will not presume that the testator meant the investment to be made on the mortgage of a personal chattel, as a ship, or on real security in Ireland, Scotland, or in any foreign country, not in England. *Baker v. Sutton*, 1 Keen, 224, 234.

No bequest, however, will be invalid where an option is left to the trustees to invest in an unobjectionable manner, as where money is directed to be invested in real or other security. *Att.-Gen. v. Goddard*, T. & R. 348; *Graham v. Paternoster*, 31 Beav. 30; *Re Beaumont's Trusts*, 32 Beav. 191.

Upon the same principle, where a bequest of money is made to a charitable society, the bequest will be valid if, according to the regulations of the society, their funds may be expended in some manner not obnoxious to the statute 9 Geo. 2, c. 36, as well as in the purchase of land (*Church Building Society v. Barlow*, 3 De G., Mac. & G. 120; see also *Carter v. Green*, 3 K. & J. 591; *Re Claney*, 16 Beav. 296; *Wilkinson v. Barber*, 14 L. R., Eq. 96). Seeus, where the charitable society to which the money is bequeathed are, by their rules, bound

to lay the money out in the purchase of real estates (*Widmore v. Woodroffe*, Amb. 636; 1 Bro. C. C. 13, n.; *Middleton v. Clitherow*, 3 Ves. 734), or if, although they are not bound to do so, the testator points out a mode of investment obnoxious to the act. *Denton v. Lord George Manners*, 2 De G. & Jo. 675; 25 Beav. 38.

Where the ultimate intention is to purchase land, a bequest for that purpose to a charity will not be rendered valid by a direction that, until an eligible purchase can be made, the money is to be invested in an unobjectionable manner. *Grieves v. Case*, 4 Bro. C. C. 67; 1 Ves. jun. 548; *Pritchard v. Arbouin*, 3 Russ. 458; *Mann v. Burlingham*, 1 Keen, 235; in effect overruling *Grimmett v. Grimmett*, Amb. 210; and see *Att.-Gen. v. Goddard*, Turn. & Russ. 348; *Att.-Gen. v. Hodgson*, 15 Sim. 146; *Longstaff v. Rennison*, 1 Drew. 28.

A bequest of pure personalty is of course good under the act, but it may be so connected with a devise of real estate as to be void. As where a testatrix devised certain houses for the benefit of the poor of a parish, and gave the dividends of a sum of money for the houses for ever; it was held, that as the gift of the houses was void, and that it would be contrary to the testatrix's intention that the fund should be applied otherwise than to the persons inhabiting the houses, the gift of the money was void also. *Att.-Gen. v. Goulding*, 2 Bro. C. C. 428; and see *Att.-Gen. v. Whitchurch*, 3 Ves. 141; *Priee v. Hathaway*, 6 Madd. 304; *Thompson v.*

Shakespear, 1 Johns. 612; 1 De G., F. & J. 399.

Upon the same principle, where a bequest fails in consequence of its having been made for an object illegal within the Mortmain Act, as for instance the erection of a building, a subsequent bequest for the endowment of such building will fail also. See *Smith v. Oliver*, 11 Beav. 481; *Dunn v. Bownas*, 1 K. & J. 596; *In re Cox*, *Cox v. Davie*, 7 Ch. D. 204.

If an ultimate bequest of a residue of personalty to a charity, not void in itself, is only to take effect after the employment of an indefinite sum for an object within the Mortmain Act, as the building of a chapel, the amount of which the Court cannot ascertain, the bequest of the residue will be void (*Chapman v. Brown*, 6 Ves. 404; *Att.-Gen. v. Parsons*, 8 Ves. 186; *Att.-Gen. v. Davies*, 9 Ves. 535; *Pritchard v. Arbouin*, 3 Russ. 458; *Att.-Gen. v. Hinxman*, 2 J. & W. 270; *Cramp v. Playfoot*, 4 K. & J. 479); but if the legal can be separated from the illegal portion of the bequest, it will be supported. *Chapman v. Brown*, 6 Ves. 410; *Blandford v. Thackerell*, 2 Ves. jun. 238; *Waite v. Webb*, 6 Madd. 71.

Again, the principal case decides that money to be laid out in exonerating charity lands in mortgage is void (see ante, p. 519). And this will be the case even when the incumbrance is merely equitable. *Waterhouse v. Holmes*, 2 Sim. 162.

So bequests of money secured on turnpike tolls (*Knapp v. Williams*, 4 Ves. 430, n.), upon the tolls of a harbour (*Ion v. Ashton*, 28 Beav. 379; and see *Alexander v. Brame*,

30 Beav. 153), and upon the poor and county rates (*Finch v. Squire*, 10 Ves. 41), on rates authorized by act of parliament to be levied upon the occupiers of houses in a town (*Thornton v. Kempson*, 1 Kay, 592; *Ion v. Ashton*, 28 Beav. 379; *Chandler v. Howell*, 4 Ch. D. 651; sed vide *Bunting v. Marriott*, 19 Beav. 163), or upon mortgage of freeholds (*Att.-Gen. v. Caldwell*, Amb. 635; *Att.-Gen. v. Meyrick*, 2 Ves. 44; *Att.-Gen. v. Earl of Winchilsea*, 3 Bro. C. C. 373; *White v. Evans*, 4 Ves. 21; *Currie v. Pye*, 17 Ves. 462), or leaseholds (*Chester v. Chester*, 12 L. R., Eq. 444), including equitable mortgages (*Alexander v. Brame*, 30 Beav. 153), although by mere deposit of deeds only (*Lucas v. Jones*, 4 L. R., Eq. 73), and although the deeds are a collateral security, the same being primarily secured on bonds or promissory notes (*Ib.*), will be void; and if a testator, having a sum of money secured by a mortgage both of real and personal estate, bequeaths it to charity, the Court has no jurisdiction to make an apportionment in favour of the charity, for the sum being a charge upon every part of the security, the Court has no means of knowing out of which it will come. See *Brook v. Badley*, 3 L. R., Ch. App. 676. So a bequest of money charged on lands (*Arnold v. Chapman*, 1 Ves. 108; *Att.-Gen. v. Harley*, 5 Madd. 321), of a vendor's lien on land for unpaid purchase money (*Harrison v. Harrison*, 1 Russ. & My. 71), of an unpaid premium for granting a lease, being in the nature of purchase money for which there was a

lien on the land (*Shepherd v. Beetham*, 6 Ch. D. 597), of a judgment debt, so far as it is a charge upon realty (*Collinson v. Pater*, 2 Russ. & My. 344), and a bequest of Metropolitan Board of Works Three and a half Consolidated Stock to a charity have been held void within the act. *Cluff v. Cluff*, 2 Ch. D. 222.

A bequest of shares in public companies who hold land for the purposes of or as incidental to their undertakings, provided the dividends come to the shareholders in the shape of money only, and the shareholders have no right to claim any portion of the land which is held by the companies for the purposes of its business, is not now considered as savouring of realty, and will therefore be valid. Thus bequests to charities of shares in the London Gaslight and Coke Company (*Thompson v. Thompson*, 1 Coll. 381; and see *Sparling v. Parker*, 9 Beav. 450), in the London and East and West India Dock Companies (*Hilton v. Giraud*, 1 De G. & Sm. 183), in dock and canal shares (*Walker v. Milne*, 11 Beav. 507; *In the matter of Langham's Will*, 1 Eq. Rep. 118), in joint-stock banks (the assets of which were by deed to be deemed personal estate, and which consisted of freehold, copyhold and leasehold hereditaments), railway, canal, waterworks and banking companies, of scrip shares in a projected company (*Ashton v. Lord Langdale*, 4 De G. & Sm. 402; *In re Langham's Trusts*, 10 Hare, 446; *Myers v. Perigal*, 2 De Gex, Mac. & Gord. 599; 11 C. B. 90), in the British Land Company, the business of which was purchas-

ing and improving lands and selling or letting the same, and the shares of which, by the deed of settlement, were to be personal estate (*Entwistle v. Davis*, 4 L. R., Eq. 272), in the National Freehold Land Society, established for raising by subscription a fund out of which any member should receive the amount of his share for the erection or purchase of a dwelling-house or other real or leasehold estate (Ib.), and of policies of assurance, though the assets out of which they were made payable consisted partly of real estate (*March v. Att.-Gen.*, 5 Beav. 433), railway shares (*Edwards v. Hall*, 11 Hare, 1; 6 De Gex, Mac. & G. 74; *Linley v. Taylor*, 2 Giff. 67; overruling *Ware v. Cumberlege*, 20 Beav. 503), are valid. And a mere lease by one railway company of its line to another for a term of years will not render a bequest of shares invalid as being within the Mortmain Act. *Linley v. Taylor*, 1 Giff. 67; *S. C.* on appeal, nom. *Taylor v. Linley*, 8 W. R., L. C., 735; 29 L. J., Ch. 534.

A distinction has indeed been drawn between shares in a company, and a mortgage by a company by means of debentures, a bequest of which to charities has been held both by Knight Bruce, V.-C., and Lord Hatherley, to be invalid as within the act (see *Ashton v. Lord Langdale*, 4 De G. & Sm. 402; *In re Langham's Trusts*, 10 Hare, 446; *Thornton v. Kempson*, Kay, 592); but as it has been decided that a mortgage debenture made by a railway company in the form given in Schedule C. of the Companies Clauses Act, 1845, does not

give the debenture holder a specific charge upon the surplus lands of the company, or the proceeds of the sale of them (*Gardner v. London, Chatham and Dover Railway Company*, 2 L. R., Ch. App. 201), but only on the net profits and earnings of the company (*Attree v. Hawe*, 9 Ch. D. 351), it has been held that the distinction is untenable, and that a bequest to a charity of debentures of incorporated companies, such as railway or waterworks companies, is valid (*Holdsworth v. Davenport*, 3 Ch. D. 185; *In re Mitchell's Estate*, *Mitchell v. Moberley*, 6 Ch. D. 655; *Walker v. Milne*, 11 Beav. 507; *Attree v. Hawe*, 9 Ch. D. 337). We may therefore consider the cases of *Ashton v. Lord Langdale*, 4 De G. & Sm. 402; and *Chandler v. Howell*, 4 Ch. D. 651, to be overruled.

Where mines are vested in trustees for the purposes of the undertaking generally, and not in trust for individual shareholders, and the interest of the shareholders is limited, as in the case of a mining company conducted on the cost-book principle, to the profits derived from the working of the mine, a bequest of shares in such companies is not, it seems, within the statute (*Hayter v. Tucker*, 4 K. & J. 243; see also *Watson v. Spratley*, 10 Ex. 222). Where, however, the object of a partnership in mines was a dealing with the land itself, a bequest of shares in the partnership has been held to be obnoxious to the statute. Thus a bequest to a charity of shares in the Rhymney Iron Company, which manufactured iron obtained from its own estates, was held void.

T.L.C.

Morris v. Glyn, 27 Beav. 218; but see the remarks on this case in *Entwistle v. Davis*, 4 L. R., Eq. 275.

Where, however, the land of a company is held in trust for each shareholder individually, so that each shareholder has a direct and definite interest in the land, a bequest of such shares would be invalid as savouring of realty. *Baxter v. Brown*, 7 M. & Gr. 198; see also *Watson v. Spratley*, 10 Exch. 222.

Tenant's fixtures, since they are merely personal chattels, which the owner has a right to remove, are clearly not within the act. *Johnston v. Swann*, 3 Madd. 457, 467.

A direction that a charitable legacy should be free of duty is a disposition "for the benefit" of the charity, and falls within the terms of the Mortmain Act (9 Geo. 2, c. 36, s. 1), and consequently the legacy duty on the charitable legacy can only be paid out of pure personalty. *Wilkinson v. Barber*, 14 L. R., Eq. 96, 98.

Assets will not be marshalled by a Court of Equity in favour of a charity. Thus if a testator give his real estate and personal estate (consisting of personalty savouring of realty, as leaseholds and mortgage securities, and also pure personalty), to trustees, upon trust to sell, and pay his debts and legacies, and bequeath the residue to a charity, equity will not marshal the assets by throwing the debts and ordinary legacies upon the proceeds of the real estate, and the personalty savouring of realty, in order to leave the pure personalty for the charity (*Mogg v. Hodges*, 2 Ves. 52; *Four-*

O O

Idin v. Gowdey, 3 My. & K. 397; *Johnson v. Woods*, 2 Beav. 409; *Waite v. Webb*, 6 Madd. 71; *Blann v. Bell*, 7 Ch. D. 382). The rule of the Court in all such cases is to appropriate the fund, as if no legal objection existed, as to applying any part of it to the charity legacies, then holding so much of the charity legacies to fail, as would in that way be payable out of the prohibited fund. (Per Lord Cottenham in *Williams v. Kershaw*, 1 Keen, 275, n. And see *Robinson v. Governors of the London Hospital*, 10 Hare, 19; *Johnson v. Lord Harrowby*, Johns. 425; *Jauncey v. The Att.-Gen.*, 3 Giff. 308; *Scott v. Forristall*, 10 W. R. (V. C. S.) 37). And this apportionment should be made according to the respective values of the pure and impure personalty at the testator's death. *Calvert v. Armitage*, 1 Hem. & Mill. 446; 2 N. R. (V. C. W.) 60, overruling on this point *Robinson v. The Governors of London Hospital*, 10 Hare, 12. "The rule," said his Honor, "is as in *Sparling v. Parker* and *Williams v. Kershaw* (cited 5 Seton, Decrees, 176), that the proportion in which the bequest fails is to be ascertained, according to the state and value of the assets at the testator's death, and not at the time of apportionment."

In a singular case, where executors were directed to purchase a presentation to Christ's Hospital, the result of the rule against marshalling assets for a charity was, that the bequest failed altogether, there not being sufficient money from the pure personalty alone to effect the purchase. *Cherry v. Mott*, 1 My. & Cr. 123.

But although a Court of Equity will not marshal assets for charitable legacies, a testator may in effect himself marshal or arrange his assets, by directing his charitable legacies to be paid exclusively out of his pure personalty, and the Court will, as it is not illegal, give effect to his intention. *Robinson v. Geldard*, 3 Mac. & G. 735; *Sturge v. Dimsdale*, 6 Beav. 462. See, however, *The Philanthropic Society v. Kemp*, 4 Beav. 581; *Nickisson v. Cockill*, 32 L. J., N. S., Ch. 753; 3 De G., Jo. & Sm. 622; *Wigg v. Nicholl*, 14 L. R., Eq. 92; *Wills v. Bourne*, 16 L. R., Eq. 487; *Miles v. Harrison*, 9 L. R., Ch. App. 316; *Gaskin v. Rogers*, 2 L. R., Eq. 285.

And it seems that, where a testator has directed his charity legacies to be paid out of his pure personalty, the charity legatees will have a right to stand in the place of specialty creditors who may have exhausted the pure personalty, inasmuch as it is not the Court, but the testator, who marshals the assets. *Att.-Gen. v. Lord Mountmorris*, 1 Dick. 379.

Although the testator may have directed his charitable legacies to be paid out of his pure personalty in priority of other legacies, if he has given no direction as to the funds out of which his debts and funeral and testamentary expenses are to be paid, the pure personal estate must contribute with the other personal estate to their payment, and also to the costs of the suit, before it can be applied in satisfaction of the charitable legacies. See *Tempest v. Tempest*, 7 De G., Mac. & G. 470, where Lord Cranworth, L. C., reversed the

decision of Sir W. Page Wood, V. C., reported 2 K. & J. 695; *Beaumont v. Oliveira*, 4 L. R., Ch. App. 309, 6 L. R., Eq. 534.

And where the pure personalty of a testator, which he has directed to be applied in payment of his charitable legacies, is insufficient for that purpose, and the testator has left personalty savouring of realty in England, and therefore not liable to the payment of the legacies, and real property abroad included in a residuary devise, and therefore subject to the payment of legacies, the legatees may claim to be paid such part of their legacies as may remain unpaid, but their claim must abate in the proportion which the personalty savouring of realty bears to the proceeds of the real estate abroad, which are not subject to the provisions of the statute. *Beaumont v. Oliveira*, 4 L. R., Ch. App. 309.

Where, however, a testator having both pure and impure personalty directs a sum of money to be laid out at the option of the trustees, in a manner either obnoxious or not obnoxious to the Mortmain Act,—as for instance, the erection or endowment of a church,—and another Act of Parliament allows a certain sum of money either of pure or impure personalty to be bequeathed for the purposes obnoxious to the Mortmain Act, it has been held that such latter sum may first be taken from the impure personalty and applied to the purpose obnoxious to the Mortmain Act, and that the rest of the pure personalty may be applied for the other purposes. See *Sinnett v. Herbert*, 7 L. R., Ch. App. 232.

It seems that the rule of the Courts of Equity in England, which will not allow marshalling in favour of legacies given to charities, is not applicable to India. *Macdonald v. Macdonald*, 14 L. R., Eq. 60.

Secret or honorary trusts will not be allowed in evasion of the statute; for if there be a devise to persons and their heirs, and there is a secret understanding between the devisees and the testator, that they will hold the land upon trust for a charity, the devise will be void, as being made in fraud of the statute, and the devisees will be compelled by the Court of Chancery to answer as to the secret trust, and will not be allowed to plead the Statute of Frauds (*Boson v. Statham*, 1 Eden, 508; *Edwards v. Pike*, Ib. 267; *Muckleston v. Brown*, 6 Ves. 52; *Strickland v. Aldridge*, 9 Ves. 516; *Pilkington v. Boughey*, 12 Sim. 114; *Johnstone v. Hamilton*, 5 Giff. 30; *Springett v. Jennings*, 10 L. R., Eq. 488; 6 L. R., Ch. App. 333; see note to *Lester v. Foxcroft*, 1 L. C., Eq. 845—847, 5th ed.), even when the devise is made to several persons as *joint tenants* upon an understanding only with one of them (*Russell v. Russell*, 9 Hare, 387; 10 Hare, 204); but where a devise was made to several persons as *tenants in common*, and a subsequent communication of the testator's intentions in favour of a charity was made to one of them only, the other devisees were held not to be affected by a trust. *Tee v. Ferris*; 2 K. & J. 357; *Rowbotham v. Dunnnett*, 8 Ch. D. 430.

When a secret trust is neither ad-

mitted nor proved, notwithstanding a testator has left a memorandum desiring the land devised to be applied to charitable purposes, the devisees will take a beneficial interest. *Addington v. Cann*, 3 Atk. 141; *S. C.* Barn. Ch. Rep. 130; *Paine v. Hall*, 18 Ves. 475; see also *Lomax v. Ripley*, 3 Sm. & Giff. 481; *Walgrave v. Tebbs*, 2 K. & J. 313; *Wheeler v. Smith*, 1 Giff. 300; *Carter v. Green*, 3 K. & J. 591, 603; *Jones v. Badley*, 3 L. R., Ch. App. 362, reversing *S. C.* reported 3 L. R., Eq. 635, and see 1 L. Ca. Eq. 847, 5th ed.

The statute cannot be evaded by a covenant in an unenrolled deed, that the executors should pay a sum of money after the covenantor's death, which would have to be raised out of his real estate or impure personalty (*Jefferies v. Alexander*, 8 H. L. Ca. 594, reversing the decision of the Lords Justices, in *S. C.* nom. *Alexander v. Brame*, 7 De G., Mac. & G. 525, which reversed the decision of Sir J. Romilly, M. R., reported 19 Beav. 436). And if the covenantor died possessed of pure and impure personalty, the debt created by the covenant would, like a legacy, have to abate in the proportion of the pure to the impure personalty. *Fox v. Lownds*, 19 L. R., Eq. 453.

Where a testator by his codicil revokes legacies well given to charities, and gives the fund to charitable purposes which are void within the Mortmain Act, the revocation of the legacies given by the will takes effect, although the legacy substituted for them by the codicil fails. *Tupper v. Tupper*, 1 K. & J. 665; see

also *Quinn v. Butler*, 6 L. R., Eq. 225.

Where real estate is devised in trust for a charity, not only is the trust made void by the act, but the devise of the legal estate also, which in the event of there being no residuary devise in which it is comprised, or no valid gift over, descends to the heir-at-law, who may recover the estate at law. *Addington v. Cann*, 3 Atk. 155; *Doe d. Burdett v. Wrighte*, 2 B. & Ald. 710; *Pilkington v. Boughey*, 12 Sim. 114; *Cramp v. Playfoot*, 4 K. & J. 479.

Where, however, there is an absolute devise of land to devisees, and it afterwards appears that they had agreed with the testator to hold the land upon a secret trust for a charity, the devise of the legal estate will be good, but the devisees, in the event of the land not being comprehended in any residuary devise, will descend upon the heir-at-law. *Sweeting v. Sweeting*, 12 W. R. (V. C. K.) 239.

Where, in addition to charitable trusts, there are other trusts not liable to any objection, the devise of the legal estate will be supported by the valid trust. *Willett v. Sandford*, 1 Ves. 186; *Arnold v. Chapman*, Id. 108; *Doe v. Pitcher*, 6 Taunt. 359; *Doe v. Copestake*, 6 East, 328; *Doe d. Chidgey v. Harris*, 16 Mee. & W. 517; *Wright v. Wilkin*, 7 Jur., N. S. 441.

Where, however, the trusts are partially invalid, as being in contradiction of the mortmain law, there will to that extent be in the case of freeholds a resulting trust for the heir-at-law, and leaseholds or other personalty savouring of realty given

to a charity will go to the next of kin of the testator. *Middleton v. Cater*, 4 Bro. C. C. 409; *Chapman v. Brown*, 6 Ves. 404.

When a sum given to charitable uses is *excepted* out of a devise, it will in general result for the benefit of the heir (*Arnold v. Chapman*, 1 Ves. 108; *Gravenor v. Hallum*, Amb. 643); but where lands are given *subject* to a charge, and the charge is void under the Mortmain Act, the sum so charged sinks for the benefit of the devisee. *Wright v. Row*, 1 Bro. C. C. 61; *Jackson v. Hurlock*, 2 Eden, 263: see the remarks of Lord Brougham, *Henchman v. The Att.-Gen.*, 3 My. & K. 493.

Where property is devised on condition to transfer part to a charity, the devisee is entitled to the whole, discharged of the condition. *Poor v. Mial*, 6 Madd. 32; and see *Henchman v. The Att.-Gen.*, 3 My. & K. 485.

So where land is directed to be sold, and part of the proceeds is given to a charity, the part which thus fails on account of the illegality of the gift will result to the heir-at-law (*Att.-Gen. v. Lord Weymouth*, Amb. 20; *Hopkinson v. Ellis*, 10 Beav. 169). Upon the same principle, where money is directed to be laid out in land for the benefit of a charity, there will be a resulting trust for the next of kin. *Cogan v. Stephens*, cited 1 Beav. 482.

When there are no next of kin the crown will be entitled. Thus, where a man died possessed of leaseholds which he directed to be sold, and the money paid to a charity, the

executor not being beneficially entitled in consequence of his having had a legacy, and there being no next of kin, it was held that the executor was a trustee for the crown (*Middleton v. Spicer*, 1 Bro. C. C. 201; *Johnston v. Hamilton*, 5 Giff. 30). In the case, however, of *Henchman v. The Att.-Gen.*, 3 Myl. & K. 485, there was a devise of copyhold land in fee, upon condition that the devisee, within one month, should pay 2,000*l.* to the testator's executor, to be applied, after payment of debts and legacies, to charitable purposes. The testator died without leaving any customary heir or next of kin. It was held by Lord Brougham, C., that the proportion of the 2,000*l.* which was void under the Mortmain Act, was to be considered as real estate undisposed of, and that the devisee and not the crown was entitled to it.

If there is a residuary devise or bequest in the will, the realty or personalty may fall into it, upon the devise or bequest of it being void, as being given to charitable purposes. But with regard to wills made before the year 1838, it must be remembered that every residuary devise of real estate, however general in its terms, was in its nature specific, and only comprised lands not given before, or rather not *expressed* to be given before, by the will. See Jarman on Wills, 610, 3rd ed.; *In re Brown*, 1 K. & J. 522.

A gift over to individuals or to charitable uses not void by the law of mortmain, in the event of the previous gift being void by that law, is valid, and will not, according to

the notion of Lord Northington (*Att.-Gen. v. Tyndall*, 2 Eden, 207, 214), be taken as intended merely *in terrorem*, or be held a fraud upon the mortmain law. *De Themmines v. De Bonneval*, 5 Russ. 288; *Robinson v. Robinson*, 19 Beav. 494; *Carter v. Green*, 3 K. & J. 591.

Where there is a devise to a charity, which fails of operation on account of the Statute of Mortmain, a limitation over to a devisee, although it was to take place in a different event, may nevertheless take effect. *Warren v. Rudall*, 4 K. & J. 603, 618; *Hall v. Warren*, 9 H. L. Ca. 420.

Although it appears that lands have been devised by will to a charity, after a great lapse of time, when trustees set up the invalidity of the devise, the presumption will be made by the Court, which it will lie upon them to rebut, that by some legal means the gift to the charity has been made good. *Att.-Gen. v. Moor*, 20 Beav. 119.

IV. *Dispositions to Charities not coming within, and exceptions from, the 9 Geo. 2, c. 36.*

Dispositions of pure personalty not connected with real estate, in modes previously pointed out as being obnoxious to the provisions of 9 Geo. 2, c. 36, may be made to charitable purposes, by will or otherwise, to any amount. And such dispositions, as will be hereafter shown, have ever met with the greatest favour and consideration by our Courts.

The Mortmain Act is not applicable to Scotland (*ante*, p. 534), nor

to Ireland (*Campbell v. Lord Radnor*, 1 Bro. C. C. 272; *Att.-Gen. v. Power*, 1 Ball & B. 145, and see 24 Vict. c. 9, s. 6), nor to India (*The Mayor of Lyons v. The East India Company*, 1 Moore, P. C. Cas. 175; *Mitford v. Reynolds*, 1 Ph. 185, 192); nor in general to our colonies—as to New South Wales (*Whicker v. Hume*, 1 De G., Mac. & G. 506; 7 H. L. Ca. 124), the West Indies (*Att.-Gen. v. Stewart*, 2 Mer. 143; see also *Curtis v. Hutton*, 14 Ves. 537; *Att.-Gen. v. Mill*, 3 Russ. 328; 5 Bligh, N. C. 593; 2 Dow & C. 393), Penang (*Choah Choon Nioh v. Spottiswoode*, Wood's Oriental Cases; *Yeap Cheah Neo v. Ong Cheng Neo*, 6 L. R., P. C. C. 381); nor to real property possessed by British subjects in foreign countries. *Beaumont v. Oliveira*, 4 L. R., Ch. App. 309; 6 L. R., Eq. 534.

The act itself, it will be observed, contains express exceptions in favour of two universities, Oxford and Cambridge (Oxford and Cambridge being at the time of the passing of the act the only universities in England), and their colleges, the scholars on the foundation of the colleges of Eton, Winchester and Westminster, and with respect to real and personal estate in Scotland.

With regard to the universities, it may be remarked that the legislature meant only to except such devises as are really and bonâ fide for the benefit of colleges, not those in which the legal interest only passes to the college in trust for other charitable uses, for then the Statute of Mortmain might be defeated every day. Per Lord Northington in *Att.-Gen. v. Tancred*, 1 Eden, 15; *S. C. Amb.*

351; and see *Att.-Gen. v. Munby*, 1 Mer. 327; *Att.-Gen. v. Whorwood*, 1 Ves. 534; see also 24 Vict. c. 9, s. 6.

It seems, however, that a devise for the benefit of particular members of a college, is just as good as if it had been made for the benefit of the whole body. Thus a devise "to the master and fellows of Christ's, in trust, that they and their successors would apply the yearly rents for some undergraduate student," has been held to be valid. *Att.-Gen. v. Tancred*, 1 Eden, 10, 11, 15.

But the devise must be for some academical or collegiate purpose. Thus, in *Whorwood v. University College, Oxford*, 1 Ves. 53, where there was a devise to the college, in order that the senior fellow should be possessor of the testator's estate and house, where he was to live hospitably, entertain the poor, distribute cordial drugs, books and pamphlets of good morals and piety to them, and give an annual entertainment to the fellows, it was held not to come within the exception of the act.

It has been held at law that a devise to a college at one of the universities, made before 9 Geo. 2, c. 36, carries the legal estate (*Bennet College v. The Bishop of London*, 2 Wm. Blacks. 1182). And if that decision were right, colleges at the universities being excepted from the Mortmain Act, a devise to them would still carry the legal fee. In the case, however, of *The Incorporated Society v. Richards*, 1 Dru. & War. 258, 305, this was doubted by

Lord St. Leonards, who thinks that such devise would only be good in equity.

It seems that if a college declines to accept a devise made to it beneficially or upon trust, the Court may carry out the charitable intentions of the deviser *cy près* (*Att.-Gen. v. Andrews*, 3 Ves. 633). And where two separate gifts are made to a college, although it may decline one, it is at liberty to accept the other. *Andrew v. Trinity Hall, Cambridge*, 9 Ves. 525, 534.

Lord Northington seemed to be of opinion, in *Att.-Gen. v. Tancred*, that the exception extended only to colleges established in the universities at the time of the statute; but Lord Rosslyn expressed his doubts of the distinction. *Att.-Gen. v. Bowyer*, 3 Ves. 728, note (f).

With regard to Scotland, it has been decided, that a legacy of money to be laid out in the purchase of heritable securities (*Oliphant v. Hendrie*, 1 Bro. C. C. 571), or in land there (*Mackintosh v. Townsend*, 16 Ves. 330), comes within the exception. And a bequest of money to be laid out in Ireland for charitable purposes which was good before the passing of statute 7 & 8 Vict. c. 97 (*Campbell v. Earl Radnor*, 1 Bro. C. C. 272; *Baker v. Sutton*, 1 Keen, 234; *Att.-Gen. v. Power*, 1 Ball & B. 154; *The University of London v. Tarrow*, 24 Beav. 472; 1 De G. & J. 72), has not been rendered invalid by that act. See *Pollock v. Day*, 14 Ir. Ch. Rep. 295, where it was held by the Master of the Rolls for Ireland, that a bequest of money for the

purposes of building a church in Ireland, was not within 7 & 8 Vict. c. 97, s. 16, and was therefore valid, though the will was made within three months of the testator's death.

A bequest, however, of money arising from, or connected with, land in England, to be laid out in land in Scotland, Ireland, or the colonies, for the purposes of a charity, is void, as being within the spirit of the act 9 Geo. 2, c. 36. *Curtis v. Hutton*, 14 Ves. 537; *Att.-Gen. v. Mill*, 3 Russ. 328; 5 Bligh, N. S. 593; 2 Dow & C. 393.

By the custom of London, confirmed by Magna Charta (9 Hen. 3, c. 9), citizens and freemen of London may devise in mortmain (8 Co. 129); and as Magna Charta is not expressly repealed with reference to the customs of London by 9 Geo. 2, c. 36, it seems that, notwithstanding the latter act, citizens and freemen of London may still devise their lands within the city in mortmain (1 Bac. Abr. Charitable Uses (B.), Customs of London (A.); 1 Bro. Ab. 556; 8 Rep. 129 a; on which see the dictum of Sir R. P. Arden, M.R., Highmore on Mortmain, 127; and *Att.-Gen. v. The Fishmongers' Company*, 1 Keen, 492; *Middleton v. Cater*, 4 Bro. C. C. 410).

Since the passing of 9 Geo. 2, c. 36, many public charities and institutions have been excepted, either wholly or partially, from its operation, and consequently devises of land to the extent allowed by the acts creating those exceptions may be made to them. Amongst these may be mentioned the Foundling (17

Geo. 2, c. 29), the British Museum (26 Geo. 2, c. 22, s. 14, and 5 Geo. 4, c. 39), the Marine Society (12 Geo. 3, c. 67), the Bath Infirmary (19 Geo. 3, c. 23), Queen Anne's Bounty (43 Geo. 3, c. 107), the Royal Naval Asylum (51 Geo. 3, c. 105), Commissioners of Greenwich Hospital (10 Geo. 4, c. 25, s. 37), St. George's Hospital (4 Will. 4, c. 38, local and personal acts), the Seaman's Hospital Society (3 & 4 Will. 4, c. 9, ss. 1, 2), Museums of Art and Science (13 & 14 Vict. c. 65, repealing 8 & 9 Vict. c. 43, except as to museums already established). (*Trustees of the British Museum v. White*, 2 S. & S. 594; *Harrison v. Mayor of Southampton*, 2 Sm. & Giff. 387.) See exemptions, both general and special, from the Mortmain Act collected, Chron. Index to the Stat. 4th edit. pp. 659, 660.

A provision that a charitable corporation might, notwithstanding the Statute of Mortmain, "have, take, hold and enjoy" real estate, does not remove the disability imposed on testators by 9 Geo. 2, c. 36, so as to enable them to devise lands to charity, inasmuch as such a provision only enabled the corporation to take and hold such lands as might be properly conveyed to them in accordance with the provisions of 9 Geo. 2, c. 36. *Robinson v. Governors of London Hospital*, 10 Hare, 19. See *Mogg v. Hodges*, 2 Ves. 52, where Lord Hardwicke observed that "The clause was inserted to avoid the trouble of applying for a licence in mortmain, and was to be considered as such a licence; that the

governors were thereby empowered to take lands to such value, but still with a proviso that they were granted to them in the manner prescribed by that law."

Where by a clause in an act of parliament a charitable institution is enabled by bequest or devise to take and hold any sums of money for the purposes mentioned, and is also enabled to hold a certain quantity of land for the purposes of the charity (*Nethersole v. School for the Indigent Blind*, 11 L. R., Eq. 1), even although it may be permitted to invest its surplus funds on mortgage (*Chester v. Chester*, 12 L. R., Eq. 444), it will not be enabled to take a bequest invalid under 9 Geo. 2, c. 36, as savouring of land, as, for instance, money secured upon mortgage. See also *Robinson v. Governors of London Hospital*, 10 Hare, 19.

Upon the same principle, in *Chester v. Chester*, 12 L. R., Eq. 444, by a private act of parliament the Deaf and Dumb Asylum was rendered capable to obtain, acquire, hold and retain, for the purposes of the institution, any moneys and other personal estate and property, including moneys secured by mortgage of or charged upon, or to arise from the sale of any hereditaments; with a proviso that nothing therein contained should make valid any grant which would be void or impeachable under the 9 Geo. 2, c. 36. It was held by Sir James Bacon, V. C., that a bequest of debts, secured to the testator's estate by equitable mortgage of leaseholds, to this charity was void.

And a capacity to take *by will*

conferred upon a charity by statute after the Mortmain Act, necessarily empowers a testator to devise land to it. *Perring v. Trail*, 18 L. R., Eq. 88.

But although a charitable corporation may have had under an act prior in date to 9 Geo. 2, c. 36, power to take land by devise, the latter act destroyed the power of testators to devise land to such charitable corporation in common with other charities (*Luckraft v. Pridham*, 6 Ch. D. 205), even although after the passing of the former act, other acts relating to the corporation were passed, giving it additional powers, but not referring to the clause as to acquiring land, and in these acts were contained clauses providing that the clauses and powers of the former acts should remain in force and be executed as fully as if they were therein re-enacted, "for continuing the provisions did not alter their nature and effect. They meant just the same when they were continued as they meant before, and even if they had been re-enacted in so many words, that could not have altered their effect, which was only to dispense with the necessity for a licence in mortmain." *Ib.* 214.

In order to promote the building, repairing, or otherwise providing of churches and chapels and houses for the residence of ministers of the Church of England, and the providing of churchyards and glebes, persons possessed in their own right may, under 43 Geo. 3, c. 108, by deed enrolled in England under stat. 27 Hen. 8, c. 16, and in Ireland under stat. 10 Car. st. 2, c. 1, s. 17,

or by will executed three months before their decease, give lands not exceeding five acres (*Fisher v. Brierley*, 1 Dè G., F. & J. 643; *Girdlestone v. Creed*, 10 Hare, 480; *Sinnett v. Herbert*, 7 L. R., Ch. App. 232), or goods and chattels not exceeding 500*l.*, for the purposes of the act (sect. 1); only one such gift to be made by one person, and where it exceeds the amount the Chancellor may reduce it (sect. 2); and no glebe upwards of fifty acres is to be augmented more than one acre (sect. 3).

It has been held that a bequest of money to arise from the sale of land is not good, even to the amount of 500*l.*, under this act. *Church Building Society v. Coles*, 1 K. & J. 145; 5 De G., Mac. & G. 324. See as to Ireland, 14 & 15 Vict. c. 71, partially repealing 10 Car. 1, c. 2.

By 6 & 7 Vict. c. 37 (extended by 14 & 15 Vict. c. 97, ss. 8, 24), any person or body corporate may, by deed enrolled under 27 Hen. 8, c. 16, in the case of hereditaments (but without deed in the case of goods and chattels), or by will, vest in the Ecclesiastical Commissioners their hereditaments, goods and chattels for the endowment or augmentation of the income of ministers of or perpetual curates of the Church of England, or for providing any church or chapel for the purposes and subject to the provisions of the act (sect. 22). It seems, that under this act money may be bequeathed to provide a site for a church, although neither at the date of the will nor at the death of the testator there was any existing district. *Baldwin v. Baldwin*, 22 Beav. 419. (No. 2.)

Again, by 42 Geo. 3, c. 116, any person, by will or otherwise, or any bodies politic or corporate, or companies, may give any sum or sums of money for the purpose of applying the same in the redemption of the land-tax charged on hereditaments settled to any charitable uses, any Statute of Mortmain or other statute or law to the contrary notwithstanding. Sect. 50.

Recently grants of land near populous places for public parks and playgrounds (22 Vict. c. 27), for the enlargement of churchyards or burial places (30 & 31 Vict. c. 133, ss. 4 and 5); purchases for the sites of buildings for the purposes of religion, education, literature, art, or science (31 & 32 Vict. c. 44); sites for places of worship, for the residence of ministers, and for burial places (36 & 37 Vict. c. 50); gifts, moreover, and devises and bequests for public parks, elementary schools, museums, and premises to be used therewith (34 Vict. c. 13), are exempted from the operation of 9 Geo. 2, c. 36, but all gifts other than for valuable consideration under 34 Vict. c. 13 must be made twelve calendar months at least before the donor's death, and be enrolled within the time when the will, codicil, or deed came into operation. Sect. 5.

The Chancery Division will not in general allow money belonging to a charity to be laid out in the purchase of land, even for the purpose of enlarging the charity, upon the ground that it would be contrary to the policy of the Mortmain Act (*Att.-Gen. v. Wilson*, 2 Keen, 680; *Mather v. Scott*, 2 Keen, 172).

However, upon a petition under an information for the management of a charity, that certain mortgages might be paid off, and various improvements and repairs effected in a schoolhouse, and that land might be purchased for that purpose, it was held that the objects of the petition, being of a mixed nature, and all manifestly for the benefit of the charity, it would not, under the circumstances, be contrary to the policy of the Mortmain Act to allow the purchase of the land. *Att.-Gen. v. The Wardens, etc. of Highgate School*, 14 L. J., N. S., Ch. 425; *Att.-Gen. v. Mansfield*, 14 Sim. 601; *In re Honnor's Trust*, 3 W. R. 429 (V. C. K.).

Any incorporate charity, or the trustees of any charity, whether incorporated or not, may now, with the consent of the charity board, invest money arising from the sale of land belonging to the charity, or received by way of equality of exchange or partition, in the purchase of land, and may hold such land, or any land acquired by way of exchange or partition, for the benefit of such charity, without any licence in mortmain. 18 & 19 Vict. c. 124, s. 35.

Again, the incorporated trustees of any charity are now competent to purchase and hold lands for the purposes mentioned in the 27th section of the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), viz.:—"for the erection or construction of any house or building, with or without garden, playground or other appurtenances, for the purposes of any charity," with-

out licence in mortmain. *Ib.* sect. 41.

The law relating to the investment on real securities of trust funds held for public and charitable purposes has been amended by 33 & 34 Vict. c. 34, which enacts that, It shall be lawful for all corporations and trustees in the united kingdom holding moneys in trust for any public or charitable purpose to invest such moneys on any real security authorized by or consistent with the trusts on which such moneys are held, without being deemed thereby to have acquired or become possessed of any land within the meaning of the laws relating to mortmain, or of any prohibition or restraint against the holding of land by such corporations or trustees contained in any charter or act of parliament; and no contract for or conveyance of any interest in land made *bonâ fide* for the purpose only of such security shall be deemed void by reason of any non-compliance with the conditions and solemnities required by 9 Geo. 2, c. 36. (Sect. 1.) Provided always that in every case in which the equity of redemption of the premises comprised in any such security shall become liable to foreclosure or otherwise barred or released, the same shall be thenceforth held in trust to be sold and converted into money, and shall be sold accordingly; and if any decree shall be made in any suit for the purpose of redeeming or enforcing such security, such decree shall direct a sale (in default of redemption) and not a

foreclosure of such premises (sect. 2). The words "real security" in the act include all mortgages or charges legal or equitable of or upon lands or hereditaments of any tenure, or of or upon any estate or interest therein or any charge or incumbrance thereon; and the word "conveyance" includes all grants, releases, transfers, assignments, appointments, assurances, orders, surrenders, and admissions whatsoever operating to pass or vest any estate or interest at law or in equity, in the premises comprised in any real security. Sect. 3.

A fund in court, paid in under the Lands Clauses Consolidation Act, as the price of charity land, may be paid out to the trustees of the charity, as being the persons absolutely entitled thereto (*In re Spurstowe's Charity*, 18 L. R., Eq. 279). And in a recent case where the purchase-money of freeholds, vested in charitable trustees having an absolute legal estate, was paid into court under the Lands Clauses Consolidation Act, the court allowed it to be invested in leaseholds. *In re Rehoboth Chapel*, 19 L. R., Eq. 180.

V. *The Construction adopted by Courts of Equity, with regard to valid Gifts to Charities, and herein of the Doctrine of Cy-près.*

When a bequest is made to a charity of pure personalty, the Courts have adopted rules of construction which render such bequests valid, although they would

clearly have been invalid if construed according to the rules adopted with respect to legacies to individuals. See *Bruce v. The Presbytery of Deer*, 1 L. R., Ho. Lo. Sco. 96; *Morgan v. Morris*, 3 Macq. 134.

The general principle upon which the Court acts is well laid down by Lord Eldon in the leading case of *Moggridge v. Thackwell*, 7 Ves. 69; viz. "that if the testator has manifested a *general intention* to give to charity, *the failure of the particular mode* in which the charity is to be effectuated shall not destroy the charity; but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished."

Where a person bequeaths a legacy to such charitable purposes as he shall afterwards direct, and dies without leaving any direction, the legacy will nevertheless be effectuated by the Court by a scheme. *Mills v. Farmer*, 1 Mer. 55; see also *Ommanney v. Buteher*, T. & R. 270; *Mayor of Gloucester v. Wood*, 3 Hare, 131, 144; and see *Wheeler v. Sheer*, Mos. 288; *The Commissioners of Charitable Donations v. Sullivan*, 1 D. & W. 501; *Aston v. Wood*, 6 L. R., Eq. 419.

And where a testator, after directing that the residue of a fund should "be given by his executors to such charitable institutions as he should by any future codicil give the same, and in default of any such gift, then to be distributed by his executors at their discretion," and the testator

died without making any subsequent codicil, it was held that the ultimate trust of the codicil was that the residue should be distributed by the executors among charitable institutions at their discretion, and that a trust in favour of charity was created. *Pocock v. Att.-Gen.* 3 Ch. D. 342.

Where a gift is made to a class generally, and no objects of it are selected; as, for instance, where there is a bequest "to the poor inhabitants" of a particular place (*Att.-Gen. v. Clarke*, Amb. 422); or the poor generally (*Att.-Gen. v. Matthews*, 2 Lev. 127; *S. C. nom. Frier v. Peacock*, Rep. t. Finch, 245; *Att.-Gen. v. Rance*, cited Amb. 422), the Court will support the legacy and make the selection. So likewise a bequest of stock for putting out "poor relations" apprentices, confined by a codicil to two families, was held good as a charity (*White v. White*, 7 Ves. 423; and see *Att.-Gen. v. Price*, 17 Ves. 371). So a bequest "to the widows and children of seamen belonging to the town of Liverpool," was held a good charitable bequest, although it was urged that it was void for uncertainty. *Powell v. Att.-Gen.*, 3 Mer. 48; and see *Att.-Gen. v. Wilkinson*, 1 Beav. 370.

Even if there be a bequest to trustees for charitable purposes generally, or as they shall in their discretion think fit, no objects being named, it will be carried into effect (*Baylis v. Att.-Gen.*, 2 Atk. 239; and *Att.-Gen. v. Herrick*, Amb. 712; see *Paice v. Archbishop of Canterbury*, 14 Ves. 364; *Wilkinson v. Lindgren*, 5 L. R., Ch. 570;

Copinger v. Crehane, 11 Ir. R., Eq. 429); so where there are objects named (*Att.-Gen. v. Gleg*, 1 Atk. 356; *Att.-Gen. v. Baxter*, 1 Vern. 247; *Cook v. Duckenfield*, 2 Atk. 562; *Att.-Gen. v. Freeman*, 1 Dan. Exch. Rep. 117; *Dolan v. Macdermot*, 5 L. R., Eq. 60; 3 L. R., Ch. App. 676.

Moreover, if the trustees die during the life of the testator (*Moggridge v. Thackwell*, 7 Ves. 36; 13 Ves. 416; *Att.-Gen. v. Hickman*, 2 Eq. Ca. Abr. 193, pl. 14; *Walsh v. Gladstone*, 1 Ph. 290), or if the testator erases their names from his will without substituting others (*White v. White*, 1 Bro. C. C. 12), or if they refuse or neglect to act (*Att.-Gen. v. Boulton*, 2 Ves. jun. 380; 3 Ves. 220), the bequest will not fail.

Where there is a general intention in favour of charity, and there is a failure of the particular mode in which it was to be effectuated, the doctrine of *cy près* will be applicable, although the residue be given to a charity, unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue. *Mayor of Lyons v. Advocate-General of Bengal*, 1 App. Ca. 91, 115.

Where a person by deed or will manifests a *general intention* in favour of charity, even although he mention no particular objects (*Att.-Gen. v. Herrick*, Amb. 712); or if he directs specific payments to be made to particular objects, which do not exhaust the whole proceeds of the property (*Arnold v. Att.-Gen.*, Show. P. C. 22; nom. *Att.-Gen. v. Mayor of Coventry*, 2 Vern. 397;

Colles, P. C. 280; 7 Bro. P. C. 235, Toml. ed.; *Att.-Gen. v. Minshull*, 4 Ves. 11; *Att.-Gen. v. Haberdashers' Company*, 4 Bro. C. C. 103; 1 Ves. jun. 295; *The Merchants' Company v. Att.-Gen.*, 2 Bligh, N. S. 178; *Att.-Gen. v. Coopers' Company*, 3 Beav. 29; and see *Att.-Gen. v. Sparks*, Amb. 201; and Lord Eldon's observations in *Att.-Gen. v. Mayor of Bristol*, 2 J. & W. 319; *Pieschel v. Paris*, 2 S. & St. 384), the Court will not as in ordinary cases hold that the surplus results to the donor or his representatives, but will consider it applicable to the purposes of the charity. See *The Att.-Gen. v. Earl of Winchelsea*, 3 Bro. C. C. 373; *Att.-Gen. v. Goulding*, 2 Bro. C. C. 428; *The Bishop of Hereford v. Adams*, 7 Ves. 324; *Merchant Taylors' Company v. Att.-Gen.*, 11 L. R., Eq. 35; 6 L. R., Ch. App. 512.

Although a person does not make any general declaration of devoting the whole of the property to charity, if he gives each and every portion of the whole income at the time to some charitable purpose, and by that means exhausts the whole, then if the income should afterwards increase, the increase will also be applicable to charitable purposes, and the different objects will take the increased income, according to their relative amounts. The leading case for this proposition is *The Thetford School Case*, 8 Co. 130; see also *Eltham Parish v. Warreyn*, Duke, 67; *Sutton Colefield Case*, Second Resolution, Duke, 68; *Hynshaw v. Morpeth Corporation*, Duke, 69; *Kensington Hastings Case*, Duke, 71; *Ladd v. London*

City, Mos. 99; *Att.-Gen. v. Coopers' Company*, 19 Ves. 187; *Att.-Gen. v. Master of Catherine Hall*, Cambridge, Jac. 381; *Att.-Gen. v. Wilson*, 3 My. & K. 362; *Att.-Gen. v. Caius College*, 2 Keen, 150; *Att.-Gen. v. Drapers' Company*, 2 Beav. 508; 4 Beav. 67; 6 Beav. 383; *Att.-Gen. v. Coopers' Company*, 3 Beav. 29; *Att.-Gen. v. Christ's Hospital*, 4 Beav. 73; *Att.-Gen. v. Gilbert*, 10 Beav. 517; *Att.-Gen. v. Jesus College, Oxford*, 29 Beav. 163; *Att.-Gen. v. Marchant*, 3 L. R., Eq. 424; *Merchant Taylors v. Att.-Gen.*, 11 L. R., Eq. 35; 6 L. R., Ch. App. 512; *Att.-Gen. v. Wax Chandlers' Company*, 6 L. R., H. L. 1. But see the remarks of Lords Hardwicke and Eldon in *Att.-Gen. v. Johnson*, Amb. 190, and *Att.-Gen. v. Mayor of Bristol*, 2 J. & W. 318.

Where, however, there is no general intention shown of devoting the whole income, or if the whole of the existing income be not given to charitable purposes, and particular payments only are directed to be made to certain charitable objects, the devisees in trust, as for instance a corporation, will take the surplus beneficially (*Att.-Gen. v. Mayor of Bristol*, 3 Madd. 319, 2 J. & W. 294; *Att.-Gen. v. Skinners' Company*, 2 Russ. 407, overruling *S. C.* 5 Madd. 173; *Att.-Gen. v. Gascoigne*, 2 My. & K. 647; *Att.-Gen. v. The Cordwainers' Company*, 3 My. & K. 534; *Att.-Gen. v. Merchant Venturers' Company*, 5 Beav. 338; *Att.-Gen. v. Grocers' Company*, 6 Beav. 526; *Att.-Gen. v. Smithies*, 2 Russ. & My. 717; *Att.-Gen. v. The Fishmongers' Com-*

pany, 2 Beav. 151, 5 My. & Cr. 11; *Att.-Gen. v. Brazenose College*, 2 C. & F. 295; *Mayor of Southmolton v. Att.-Gen.*, 5 H. L. Ca. 1, reversing *S. C.* 14 Beav. 357; *Mayor of Beverley v. Att.-Gen.*, 6 H. L. Ca. 310, reversing *S. C.* 15 Beav. 546; 6 DeG., Mac. & G. 256; *Att.-Gen. v. The Dean & Canon of Windsor*, 24 Beav. 679; *Att.-Gen. v. Trinity College, Cambridge*, 24 Beav. 383; *Att.-Gen. v. Jesus College, Cambridge*, 24 Beav. 163; *Att.-Gen. v. Jesus College, Oxford*, 29 Beav. 163; or, if undisposed of, the donor or his representatives will take it by way of resulting trust, subject to the specified payments. *Att.-Gen. v. Mayor of Bristol*, 2 J. & W. 307, 332; *Att.-Gen. v. Gascoigne*, 2 M. & K. 647.

Where, moreover, an estate is given to a corporation, and out of the income specified amounts are given to various charitable objects, which do not exhaust the whole, if the residue or surplus is given to the corporation, the Court infers that such unascertained surplus of the income is the measure of the bounty which the testator intended the corporation to have for their own advantage, whether it be little or great. *Southmolton v. Att.-Gen.*, 5 H. L. Ca. 1; *Mayor of Beverley v. Att.-Gen.*, 6 H. L. Ca. 310; *Att.-Gen. v. Dean of Windsor*, 8 H. L. Ca. 369.

If the founder of a charity introduce a condition or clause of forfeiture upon the non-performance of a condition, it is then shown that he intended or expected that the donees would derive some benefit from the gift; and therefore in all

such cases where there is an unascertained income, out of which the donees have to make certain payments, the Court infers that, as the estate was given to them upon condition of their making these fixed payments, they were themselves to take the benefit of the surplus, whether great or small (*Jack v. Burnett*, 12 C. & F. 812); à fortiori, where it is expressly stated that they are to have the whole of the surplus. *Att.-Gen. v. The Corporation of Beverley*, 15 Beav. 544.

If among the particular payments directed, some are not charitable, but are to be made to individuals, and can not have been intended to abate, it will be inferred that none of the particular payments were either to abate or to increase, and that the surplus, whatever it might be, was to go to the donees in trust. *Att.-Gen. v. The Cordwainers' Company*, 3 My. & K. 534; *Mayor of Beverley v. The Att.-Gen.*, 6 H. L. Ca. 310.

If, on the other hand, the surplus undisposed of is insignificant, and there is a direction that the particular payments are to abate proportionally in the event of depreciation of the property, the inference arises, that they were in like manner to share proportionally in any increase. *The Mercers' Company v. The Att.-Gen.*, 2 Bl. N. S. 165.

We have before seen that gifts to charities do not fall within the rule against perpetuities (ante, p. 495), which is applicable to all gifts to individuals. The Courts likewise, in considering whether a gift is created in perpetuity for a charity, do not adhere to forms, but always

look at the intention, and will carry that into effect, though it would be otherwise with regard to ordinary gifts. Thus, although a legal fee cannot by deed be given to individuals without the word "heirs," and could not (previous to the late Wills Act, 1 Vict. c. 26) be given in a will without the use of the same word "heirs," or some equivalent expression, those or similar words are not indispensable in creating perpetual gifts to charity (*Att.-Gen. v. Corporation of Berwick-upon-Tweed*, Tam. 239, 246). A gift to a man teaching at a particular school of 5*l.* yearly, for teaching three boys, has been held not to be a gift to a particular schoolmaster, but to the school itself for teaching three boys in succession (*Cheeseman v. Partridge*, 1 Atk. 436). So likewise a gift to the parish church of St. Andrew, Holborn, was construed to be a gift to the parson and parishioners of that parish and their successors for ever. *Ib.* 437, and see *Att.-Gen. v. Cock*, 2 Ves. 273.

And where church trustees, consisting of the vicar, churchwardens and other parishioners, were entitled to the burial fees of an additional burial ground, to be applied by them to certain definite charitable purposes, the burial ground having been closed by an order in council, and a railway company having taken part thereof, it was held by Wood, V. C., that the trustees were entitled to have the purchase-money invested to their account and the dividends paid to them; but his Honor refused a scheme, observing that the trustees would hold it the same as they held any

other moneys subject to their trusts. *In re St. Pancras Burial Ground*, 3 L. R., Eq. 173, 180.

If, however, a gift in trust for a charity is itself conditional upon a future and uncertain event, it is subject to the same rules and principles as any other estate depending upon its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*. Per Lord Selborne, L. C., in *Chamberlayne v. Brockett*, 8 L. R., Ch. App. 211.

Although in the case of ordinary legacies, a legatee having a vested interest may, on his attaining twenty-one, call for payment of his legacy, even though the accumulation thereof may be directed for a period in excess of the limits allowed by the statute (see *Gosling v. Gosling*, Johns. 265; *Coventry v. Coventry*, 2 Dr. & Sm. 470; but see *Talbot v. Jevvers*, 20 L. R., Eq. 255), this will not be the case where the legacies are to charities. See *Harbin v. Masterman*, 12 L. R., Eq. 559, where charities were entitled to personalty directed to be accumulated: it was held by Wickens, V. C., that the charities were not entitled to have the accumulation stopped and to be paid at once, but that the accumulations must go on until further orders.

Defects in assurances of charities have for a long period been aided; for instance (before 9 Geo. 2, c. 36), a tenant in tail by appointing or conveying lands to a charity with-

out a recovery, has been held to bind his issue and the remainderman or reversioner in fee (*Tay v. Slaughter*, Prec. Ch. 16; *Att.-Gen. v. Burdett*, 2 Vern. 755); and even by a devise to a charity (*Att.-Gen. v. Rye*, 2 Vern. 453; *Jennor v. Harper*, Gilb. Eq. Rep. 44). So likewise (previous to the Mortmain Act) the Court of Chancery would supply the surrender of copyholds to the uses of a will in favour of a charity (*Att.-Gen. v. Andrews*, 1 Ves. 225; *Att.-Gen. v. Downing*, Amb. 571); and it has been held at the present day, that by analogy the defective execution of a power in favour of a charity ought to be aided in equity. Thus, where a testatrix having a general power of appointment exercised it without pursuing the formalities required by the power, it was nevertheless held to be a good appointment in favour of a charity. *Sayer v. Sayer*, 7 Hare, 377; *Innes v. Sayer*, 3 Mac. & G. 606.

Where in a gift to charitable purposes, persons holding certain offices (but who are not corporations sole) and *their successors*, as, for instance, ministers of a meeting house and their successors, are appointed governors, although such intention would fail in consequence of such persons not being corporations sole, nevertheless, in settling a scheme, attention would be paid to the donor's wishes. *The Att.-Gen. v. Lee*, 4 Ir. R., Eq. 84.

The doctrine of *cy près*, or approximation to the intention of the donor, being applicable to charities, when a particular charity is named by the testator, which cannot from

some cause or other take effect, and there is a general intention in favour of charity, the Court of Chancery will carry out the general charitable intention, by the adoption of some other charitable objects not inconsistent with such intention.

Where the gift denotes a charitable intention, but the object to which the exercise of it is applied is against the policy of the law, as in the case of a gift to superstitious uses, the Court will lay hold of the charitable intention, and execute it for the purpose of establishing some charity agreeable to the law, in the room of that contrary to it. *Moggridge v. Thackwell*, 7 Ves. 75; and see *Att.-Gen. v. Baxter*, 1 Vern. 248; reversed afterwards upon other grounds, *nom. Att.-Gen. v. Hughes*, 2 Vern. 105; *Da Costa v. De Pas*, Amb. 228; *S. C.* 1 Dick. 258; 2 Swanst. 487; and *Gates v. Jones*, cited in *Att.-Gen. v. Guise*, 2 Vern. 266.

Amongst the numerous examples showing how the Court will give effect to the *general* intention in favour of charity, when it cannot be effectuated in the particular mode pointed out, by reason of the failure or non-existence of the objects thereof, we may mention a few. Thus, where there was a bequest to the governors of a society, instituted "for the increase and encouragement of good servants," and no such institution could be found, it was nevertheless held by Lord Langdale, M. R., that there was a good gift to a charity, observing, that the only reason for naming the governors was, that they might be the instruments for the application

of the fund; that it was a gift for a charitable and public purpose, and that he could not persuade himself that the testator had a special intention in favour of that particular society only. *Loscombe v. Wintringham*, 13 Beav. 87. So where a testator directed funds to be provided for certain charity-schools by accumulating his property, but fixed no time for the continuance of the accumulation, which must necessarily have exceeded the legal period, it was held by Sir L. Shadwell, V. C., that although, in consequence of the direction to accumulate being void, the particular mode in which the testator meant the benefits to be doled out to the objects of his bounty could not take effect, yet, as there was a devotion by the testator of his personal estate to charitable purposes, the next of kin had no claim, and that the charitable intention ought to be carried into effect by means of a scheme. *Martin v. Margham*, 14 Sim. 230. So where a testator bequeathed 1,000*l.* to "the Jews' poor, Mile End," and there were two charitable institutions for poor Jews at Mile End, and it did not appear which of the charities was meant, it was held by Lord Langdale, M. R., that the fund ought to be applied *cy præs*; and the Court divided the fund between the two charitable institutions. *Bennett v. Hayter*, 2 Beav. 81. See also *Mayor, &c. of Gloucester v. Wood*, 3 Hare, 131, 144; and see the note, 13 Beav. 89.

In *The Att.-Gen. v. The Bishop of Llandaff*, cited 2 My. & K. 586, Lord Craven by his will gave part of his property to endow scholar-

ships at the two Universities, and the residue to redeem British captives. Upon a reference to the Master it was found that there were none to redeem, and a scheme being approved was sanctioned by the Court, for using all this fund, except a moderate portion set apart in case captives should be made, and applying the residue to increase the number and income of the scholars. And see a case very similar to this, *Att.-Gen. v. Ironmongers' Company*, 2 My. & K. 576; *S. C.* 2 Beav. 313; *Cr. & Ph.* 208; 10 C. & F. 908; *Att.-Gen. v. Boulbee*, 2 Ves. jun. 380; 3 Ves. 220; see also *Att.-Gen. v. The Mayor, &c. of London*, 3 Bro. C. C. 171; *S. C.* 1 Ves. jun. 243; *Att.-Gen. v. Glasgow College*, 2 Coll. 665, reversed D. P. 1 H. L. Cas. 801; *Martin v. Margham*, 14 Sim. 230; *Loscombe v. Wintringham*, 13 Beav. 87; *Coldwell v. Holme*, 2 Sm. & Giff. 31; *Att.-Gen. v. Lawes*, 8 Hare, 32; *Att.-Gen. v. Bushby*, 24 Beav. 290; *Hayter v. Trego*, 5 Russ. 113; *Reeve v. Att.-Gen.*, 3 Hare, 191.

In the case of *Att.-Gen. v. Glyn*, 12 Sm. 84, a school was founded for the education of the poor within a certain district. The district was converted into a dock, under a local act of parliament, so that the objects of the charity failed. The Court directed the funds of the charity to be applied *cy præs* by means of a scheme.

It seems that where a charity school is transferred to a School Board under the Elementary Education Acts, 1870, 1873 (33 & 34 Vict. c. 75, s. 23; 36 & 37 Vict. c. 86, s. 13), whereby it becomes im-

possible to apply the funds with which the school is endowed according to the directions of the original trust deed, in a new scheme for regulating the application of such funds care should be taken to provide that they shall be applied for the advancement of learning in the school, as for instance by establishing exhibitions or scholarships, and not for the general purposes of the school, which would have the effect of a grant in aid of the local rates. *In re Poplar and Blackwall Free School*, 8 Ch. D. 543. In another case, however, in which such transfer had been made, but no scheme asked for, it was ordered that the endowment of the old school, which arose from the appropriation of the increased revenues of a charity estate, originally applicable to the relief of the poor, should be paid to the School Board. *School Board for London v. Faulconer*, 8 Ch. D. 571.

Sometimes charities for the benefit of the poor have been partly applied for the education of their children (see *Hereford v. Adams*, 7 Ves. 324; *Wilkinson v. Malin*, 2 Cro. & Jer. 636, 655; *Att.-Gen. v. Bovill*, 1 Ph. 762); but where the primary object of the charity is relief of the poor by the distribution of the income amongst them, that must be satisfied before any portion thereof can be applied for the purposes of education. *In re Lambeth Charities*, 22 L. J., N. S., Ch. 959; *Re Stane's Will*, 21 L. T. Rep. 261.

So where there is a gift for the "poor," or the "poorest" of the testator's relations, if an intention

in favour of charity generally can be discovered, in framing a scheme upon an increase of the funds of the charity, after providing out of the income thereof primarily for the testator's next of kin who should be proper objects of the charity, there will be a declaration that it is applicable for the benefit of charitable objects other than the kindred of the testator. *Att.-Gen. v. Duke of Northumberland*, 7 Ch. D. 745, and cases there cited.

In applying the doctrine of *cy près*, the Court will be guided by some analogy to the original destination of the funds, and will not depart from the purpose and object of the donors, unless it be wholly impossible to carry those purposes and objects into effect. See *In re Prison Charities*, 16 L. R., Eq. 129. There certain charitable trusts declared a century or two ago in favour of *poor prisoners*, having failed for want of an object by reason of the abolition of the law of imprisonment for debt, and the closing of debtors' prisons, the Attorney-General by a scheme having proposed that all the funds should be treated as one charity, and be applied to the building, establishment and maintenance of a school for children of persons convicted of crime, and undergoing sentence, it was held by Sir James Bacon, V. C., that by "poor prisoners" were meant prisoners for debt, and that the proposal did not approach sufficiently near to the charitable intentions of the donors to admit of the funds being applied *cy près* in the manner proposed. See also *Att.-Gen. v. Hankey*, 16 L. R., Eq. 140, n.

The Court has power to alter from time to time the scheme of a charity which has been settled by a previous decree of the Court, if the circumstances require it. See *Att.-Gen. v. St. John's Hospital*, 1 L. R., Ch. App. 92. There the Court refused to permit the renewal of leases of the lands of a charity, although the practice had been sanctioned by a scheme settled by the award and decree of the Court, and had been acted on since under the direction of the Court. See also *Att.-Gen. v. Bishop of Worcester*, 9 Hare, 328.

The doctrine of *cy près*, as applied by the English Court of Chancery to charities, is also acted upon by the Scotch Courts. See *Clephane v. The Lord Provost, &c. of Edinburgh*, 1 L. R., Sco. App. & D. Ca. 417; 4 Macq. 603.

Where, however, a testator shows an intention of giving to some *particular institution*, and such intention cannot be carried out, and there is no intention in favour of charity *generally*, the bequest will fail in the same mode as if it were made to an individual not in existence. Thus, in *Att.-Gen. v. Bishop of Oxford*, cited 4 Ves. 431, the testator, after giving to his executors 100*l.* each for their trouble, gave and bequeathed the rest and residue of his personal estate upon trust, "to build a church at Wheatley, where the chapel now is, in such manner as I shall hereafter direct, or, for want of such direction, as my executors shall think fit." The Bishop of Oxford, who was patron and parson of Cuddesden, in which Wheatley was, opposed the design of building a

church; and it was proposed by the defendants that the salary of the chaplain should be increased. The next of kin insisted that a new church must be built, and that the surplus belonged to them. By the first decree it was referred to the Master to take the accounts; and it was directed, that the defendants, the Bishop of Oxford, &c., do signify whether they are willing that the residue of the testator's personal estate shall be laid out in building a church at Wheatley, where the chapel now stands, with liberty to lay a plan before the Master, how the said residue may be most beneficially applied according to the will of the testator. Before the cause came on again, many transactions had taken place. The next of kin, and the persons entitled to the benefit under the will, the parishioners, acting by the bishop and their wardens, came to an agreement, that 3,000*l.*, part of the residue of the testator's personal estate, should be applied for the purpose of building a new church, and forming a fund for keeping it in repair, and that 1,000*l.*, other part thereof, should be applied towards augmenting the minister's salary; and that 4,000*l.* being paid for the purposes aforesaid, the residue should belong to the next of kin. Sir R. P. Arden, M. R., in remarking upon this case, observes, "This decree is completely decisive, that the object not being capable of taking effect, the fund could not be applied to any other charitable purpose. The Court could not have made the decree, unless they thought the residue

was not applicable to any other charitable purpose. I will not say it could not have been applied for repairing or sustaining the chapel; and I doubt whether Lord Kenyon said so; but beyond that purpose, or after satisfying it, this is decisive, that it could be applied to no other purpose; for if it was applicable to any other general charitable purpose, or any other purpose for the benefit of the parish, except of the nature pointed out, that decree could not have been justified." See also *Att.-Gen. v. Goulding*, 2 Bro. C. C. 428; *Cherry v. Mott*, 1 My. & Cr. 123; *Smith v. Oliver*, 11 Beav. 481; *Clark v. Taylor*, 1 Drew. 642; *Russell v. Kellett*, 3 Sm. & G. 264; *Carbery v. Cox*, 3 Ir. Ch. Rep. 231; *Sims v. Quinlan*, 16 I. Ch. Rep. 191; 17 Ir. Ch. Rep. 43; *In re Templemoyle School*, 4 Ir. R., Eq. 295.

Although a charitable bequest may be made to an object not in existence, and is therefore incapable of taking effect immediately, or for a considerable time after the testator's death, if the gift be immediate upon the object appearing, the funds will after a great lapse of time be applied for the purposes intended by the testator. *Att.-Gen. v. The Bishop of Chester*, 1 Bro. C. C. 444; *Att.-Gen. v. Oglander*, 3 Bro. C. C. 166; *Att.-Gen. v. Ironmongers' Co.*, 2 My. & K. 579; *Sinnett v. Herbert*, 12 L. R., Eq. 201; 7 L. R., Ch. App. 232; *Chamberlayne v. Brockett*, 8 L. R., Ch. App. 206.

It has been said to have been laid down both by Kindersley, V. C., and Stuart, V. C., that where a gift has been made by will to a charity

which has expired, it is as much a lapse as a gift to an individual who has expired (*Fisk v. Att.-Gen.*, 4 L. R., Eq. 528). See *Clark v. Taylor*, 1 Drew. 642; *Russell v. Kellett*, 3 Sm. & G. 264; *Langford v. Gowlan*, 3 Giff. 617.

It is conceived, however, that this proposition ought to be considered as confined to cases where there is only a gift to a particular charity, without there being a general charitable intention; in which case, according to the authorities already mentioned, the general intention will be carried out, although the particular charity pointed out cannot take effect. See also *In re Clergy Society*, 2 K. & J. 615; *Reeve v. Att.-Gen.*, 3 Hare, 191; *In re Maguire*, 9 L. R., Eq. 632.

And although the Court will go so far in carrying out a testator's intention with regard to charities, it has been decided that where the amount of a legacy to charitable purposes is uncertain it will be void. *Chapman v. Brown*, 6 Ves. 404; *Att.-Gen. v. Davies*, 9 Ves. 535; *Att.-Gen. v. Hinzman*, 2 J. & W. 270; and see *Ewen v. Banerman*, 2 Dow & Clarke, 74.

The question often arises how far a bequest of a residue to a charity is valid, after a gift of part thereof to an illegal object. According to the older authorities, if there was a gift of money upon trust to apply a portion of the income for a definite purpose, and then to apply the surplus to another purpose, viz., a charity; if the first purpose were sufficiently defined, to render it possible to ascertain the amount of income that would be required for

it, and that purpose failed through the gift being invalid, the gift of the surplus would be unaffected beyond the amount so ascertained. If, for instance, a testator had given a sum of money in the first place to found or erect an hospital, or the income thereof to keep tombstones not within a church in perpetual repair, and the residue to a charity, if the sum which would have been required for the hospital, or the income which would have been taken for the repairs, if the gifts for those purposes had been valid, could be ascertained, then the charity would take the residue so ascertained. *Magistrates of Dundee v. Morris*, 3 Macq. 134; *Mitford v. Reynolds*, 1 Ph. 185, 197.

When, however, it cannot be fairly ascertained what sum would be required for the first purpose, so that the whole sum given might properly be applied for it, as for instance in building a chapel, then the first purpose being void, the contingent surplus, given to a charity, not being ascertainable, the whole gift would fail. See *Chapman v. Brown*, 6 Ves. 404; *Cramp v. Playfoot*, 4 K. & J. 479; *Fowler v. Fowler*, 33 Beav. 616.

It has, however, been held by a series of decisions, that where a sum of money has been bequeathed to trustees upon trust, to apply part of the income to an illegal purpose, such as keeping tombs and tombstones not within a church in repair in perpetuity, with a gift of the residue of the income to charitable purposes, the latter will take the whole of the income, irrespective of the amount that would be required

for such repairs. *Fisk v. Att.-Gen.*, 4 L. R., Eq. 521; *Hunter v. Bullock*, 14 L. R., Eq. 45; *Dawson v. Small*, 18 L. R., Eq. 114; *In re Williams*, 5 Ch. D. 735. In the case of *In re Birkett*, 9 Ch. D. 576, these cases, though apparently with some reluctance, were followed by Sir G. Jessel, M. R.

So likewise where the purpose of the testator is uncertain or indefinite, and is not charitable in the legal sense of the word, the legacy cannot be supported. Thus, in *Morice v. The Bishop of Durham*, 9 Ves. 399, the testatrix bequeathed the residue of her personal estate to the Bishop of Durham, his executors, &c., upon trust, after paying her debts and legacies, to dispose of the ultimate residue *to such objects of benevolence and liberality as the Bishop of Durham should most approve of*, and she appointed him her sole executor. Sir W. Grant, M. R., fully admitting the doctrine that if a *charitable* purpose is expressed, however generally, it will not fail on account of the uncertainty of the objects, held, nevertheless, that the gift failed. This decision was, on appeal, affirmed by Lord Eldon: see 10 Ves. 522. See also *James v. Allen*, 3 Mer. 17; *Williams v. Kershaw*, cited 1 My. & Cr. 298; *Ellis v. Selby*, 1 My. & Cr. 286; *Thompson v. Shakespeare*, Johns. 612; *Buckle v. Bristowe*, 13 W. R. (V. C. W.) 68; *Aston v. Wood*, 6 L. R., Eq. 419; *In re Jarman's Estate*, 8 Ch. D. 584; and see *In re Clark's Trust*, 1 Ch. D. 497, where the bequest was to a Friendly Society.

So where there was a bequest of

a residue "to be given in private charity," it was held by Sir Thomas Plumer, M. R., to be an object too indefinite to be carried into effect. *Ommanney v. Butcher*, Turn. & Russ. 260; see also *Kendall v. Granger*, 5 Beav. 300; *Nash v. Morley*, 5 Beav. 177. So a gift to "charitable or public" purposes was held too indefinite to be carried into effect as a charity. *Iezey v. Jamson*, 1 S. & S. 69. See also the cases collected in the note to *Loscombe v. Wintringham*, 14 Beav. 89.

But the principles laid down in *Morice v. The Bishop of Durham* (9 Ves. 399) are not applicable to a case where the testator has definitely marked out the charitable purposes, and has not left it optional with the trustees to apply the fund for the charitable purposes or for other purposes, but has directed them to apply it for the charitable purpose, until the managing body of the charity think fit to revoke the trusts. *In re Sir Robert Peel's School at Tamworth, Ex parte the Charity Commissioners*, 3 L. R., Ch. App. 543.

When there is a latent ambiguity in a will, as to which of two or more charities was intended to be benefited by the testator, parol evidence is admissible to remove the ambiguity, by showing that the testator was interested in and subscribed to one of them. *In re Kilvert's Trusts*, 7 L. R., Ch. App. 170; reversing *Ib.* 12 L. R., Eq. 183. See also *Wilson v. Squire*, 1 Y. & C., C. C. 654; *Coldwell v. Holme*, 2 Sm. & G. 31; *Bunting v. Marriott*, 19 Beav. 163.

Where, however, there is a general intention in favour of a charity, but no object which necessarily answers to the description in the will, the gift will be applied *cy près* to charitable purposes. *Re Clergy Society*, 2 K. & J. 615; *Loscombe v. Wintringham*, 13 Beav. 87; *In re Maguire*, 9 L. R., Eq. 632. But if there are several objects equally answering the description there will be a division of the gift among them. *Simon v. Barber*, 5 Russ. 112; *In re Alehin's Trusts*, 14 L. R., Eq. 230.

There may be an apportionment of charities, by the Chancery Division, on the division of a parish (see 8 & 9 Vict. c. 70, s. 22; *In re West Ham Charities*, 2 De G. & Sm. 218; *Ex parte Incumbent of Brompton*, 5 De G. & Sm. 626; *Att.-Gen. v. Love*, 23 Beav. 499); and by the Charity Board when the gross annual income of the charities does not exceed 30*l.* 18 & 19 Vict. c. 124.

But where the charity is for a specific object, such as the repairs of a particular church, it is not apportionable. *Ex parte Incumbent of Brompton*, 5 De G. & Sm. 635; *In re Church Estate Charity, Wandsworth*, 6 L. R., Ch. App. 296.

Where ancient instruments creating the trust may bear two constructions, the Court will lean to, if not adopt, that construction which has been supported by usage. See *Att.-Gen. v. Smithies*, 1 Keen, 307; *Rex v. Varlo*, Cowp. 248; *Rex v. Osbourne*, 4 East, 327, 333; *Att.-Gen. v. Parker*, 3 Atk. 576; 1 Ves. 43; *Archbishop of York v. Stapelton*, 2 Atk. 136; *Att.-Gen. v. Drummond*, 1 Dru. & Warr. 353; *Att.-Gen. v.*

Sidney Sussex College, 4 L. R., Ch. App. 722. See further on this subject, *Tudor's Charitable Trusts*, 243, 2nd edit.

We may here remark, that long-continued *usage* will not be allowed to prevail in contravention to the clearly-expressed intention of the founder of a charity. *Att.-Gen. v. The Masters, &c. of St. Cross*, 1 Eq. Rep. 585; *Att.-Gen. v. Mayor of Bristol*, 2 J. & W. 321; *Att.-Gen. v. Fishmongers' Company*, 5 My. & C. 11, 16.

So, where the custom of an antient charity had been that the lessees of the charity lands should have renewals of leases on easy and beneficial terms, the Court, nevertheless, in settling a new scheme, refused to permit leases to be granted except at rack rent; but directed that in granting fresh leases, regard should be had to the claims of any lessees who had expended money on the faith of renewals. *Att.-Gen. v. St. John's Hospital, Bath*, 1 L. R., Ch. App. 92.

So, in the case of dissenting communities, the opinions and doctrines prescribed by the founder were to be carried out even against usage or the wishes of the majority of the congregation. See *Att.-Gen. v. Pearson*, 3 Mer. 353.

Many difficulties, however, having arisen in determining how far in such cases the governing bodies of such charities had or not departed from the principles of their founders, and claims being put in by Presbyterians, Independents, Baptists, and Unitarians, and the latter having got into possession

of most of the property of such charities, through their influence the Dissenters' Chapels Act (7 & 8 Vict. c. 45), under which, in the absence of any instrument regulating the doctrines and mode of worship, the usage for the last twenty-five years must be conclusive, and the congregation who had enjoyed the property for that period must be held entitled to it. *Att.-Gen. v. Bunce*, 6 L. R., Eq. 563. See *Tudor's Charitable Trusts*, p. 348, 2nd edit.

VI. *Administration of Charitable Trusts.*

Ordinarily, when the Chancery Division is in possession of a fund given to a charity either with or without the interposition of individual trustees, it will not part with such fund until a scheme be settled for its administration.

Where, however, a fund is given to a charitable corporation, the Chancery Division will order it to be paid without a scheme to such corporation, leaving it to be administered as part of its funds. *Society for the Propagation of the Gospel v. Att.-Gen.*, 3 Russ. 142. The Chancery Division acts in the same way, where a legacy is given to the treasurer, or other officer of a charitable institution, even although it may not be a corporation, to become part of the general funds of that institution. *Wellbeloved v. Jones*, 1 S. & S. 43; and *Re Barnett*, 29 L. J., Ch. 871.

But such payment to an officer of an institution will only be made to it without a scheme upon the Court's being satisfied that there

are already existing funds belonging to the institution; that it is not supported by merely voluntary contributions, and that the officer, as for instance the president of a college, does not hold his office by a merely precarious tenure. *Walsh v. Gladstone*, 1 Ph. 390.

Where, however, a legacy is given to a treasurer or other officer of a charitable institution, not as part of its general funds, but for permanent charitable purposes mentioned by the testator, the Chancery Division will not, without a reference for a scheme, allow the funds to be paid to such persons, even where they are entrusted by the testator with the management of the fund. *Wellbeloved v. Jones*, 1 S. & S. 90, 43; and see *The Corporation of the Sons of Clergy v. Mose*, 9 Sim. 610.

There is, moreover, an important distinction observed with regard to the administration of charitable funds, viz. that where the execution of the charitable purpose is committed to trustees with general or some particular objects pointed out, there the Chancery Division will take the administration of the trust, and carry it into effect by means of a scheme; but where the property is not vested in trustees, and the gift is to charity generally, not to be ascertained by the act of individuals referred to, the charity is to be disposed of, not by a scheme, but by the sign-manual of the king, who is the disposer of such charities in his character of *parens patrie* (*Moggridge v. Thackwell*, 7 Ves. 75; *Att.-Gen. v. Syderfen*, 1 Vern. 224; and *Att.-Gen. v. Matthews*, 2 Lev.

167; *S. C. nom. Jones v. Peacock*, Ca. t. Finch. 245; *Paice v. Archbishop of Canterbury*, 14 Ves. 372; *Copinger v. Crehane*, 11 Ir. R., Eq. 429). The Crown will also in the same manner dispose of a gift to charitable purposes void as being superstitious (*ante*, p. 543). For form of letter under the sign-manual and practice in obtaining, see *Kane v. Cosgrave*, 10 Ir. R., Eq. 211.

The Chancery Division will not settle a scheme for a foreign charity. *Collyer v. Burnett*, Tambl. 70; *Mitford v. Reynolds*, 1 Ph. 194; *Lyons v. East India Company*, 1 Moo. P. C. 176, 293.

Hence, although as a general rule a charitable trust will not fail by reason of the disclaimer of the trustees, it will do so if the trustees of a charity to be established in a foreign country disclaim, as the Court has no power either to enforce the trust or to settle a scheme. See *New v. Bonaker*, 4 L. R., Eq. 655; there a testator, by will dated in 1825, gave certain funds to the President and Vice-President of the United States, and the Governor of Pennsylvania, upon trust to build and endow a college for the instruction of youth in the State of Pennsylvania, and directed that moral philosophy should be taught therein, and a professor should be engaged to inculcate and advocate the natural rights of the black people of every clime and country, until they be restored to an equality of rights with their white brethren through the Union. The trustees disclaimed the gift. It was held by Sir R. Malins, V. C., that the Court having no power to en-

force the trust, nor to settle a scheme for the administration of the charity *cy près*, the object had failed and the funds fell into the residue. See also *Att.-Gen. v. Sturge*, 19 Beav. 597.

Where an annual and temporary income is to be distributed for charitable purposes at the discretion of trustees, the Court will not, it seems, interfere with their discretion by directing a scheme. *Waldo v. Cayley*, 16 Ves. 206; *Horde v. Earl of Suffolk*, 2 My. & K. 59, and see *Bennett v. Honeywood*, Amb. 708.

Under the Charitable Trusts Acts powers to frame schemes have been conferred upon Charity Commissioners, 16 & 17 Vict. c. 137, s. 54—60, 18 & 19 Vict. c. 124, s. 39; and upon the Judges of County Courts, 17 & 18 Vict. c. 137, s. 29—40, 23 & 24 Vict. c. 136, s. 11.

The authority of the Charity Commissioners extends to charities founded and endowed in England and Wales, although the revenues are applied abroad (*In re Duncan*, *In re Taylor's Trusts*, 2 L. R., Ch. App. 356); and it seems their authority also extends to charities which are founded and endowed abroad, if their revenues are applied in England and Wales. *Ib.*

The Charity Commissioners may, if they think fit, exercise the jurisdiction conferred on them by the 2nd and 5th sections of the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136) in contentious cases. *In re Burnham National Schools*, 17 L. R., Eq. 241, in which *In re Hackney Charities*, 34 L. J., Ch. 169, was not followed.

Considerable powers have re-

cently been conferred upon the Endowed Schools Commissioners to frame new schemes whereby charitable endowments, valid under the statute of Elizabeth, but which an advanced knowledge of political economy has shown to be either useless or mischievous, or the object of which has either wholly or partially failed, may be devoted to educational purposes. See The Endowed Schools Act, 1869 (32 & 33 Vict. c. 56,) s. 30, whereby it is provided "that, in the case of any endowment which is not an educational endowment as defined by the act, but the income of which is applicable wholly or partially to any one or more of the following purposes; namely, doles in money or kind; marriage portions; redemption of prisoners and captives; relief of poor prisoners for debt; loans; apprenticeship fees; advancement in life, or any purposes which have failed altogether, or have become insignificant in comparison with the magnitude of the endowment, if originally given to charitable uses in or before the year of our Lord 1800, it shall be lawful for the (Endowed Schools) Commissioners, with the assent of the governing body, to declare by a scheme under this act that it is desirable to apply for this advancement of education the whole or any part of such endowment, and thereupon the same shall for the purposes of this act be deemed to be an educational endowment, and may be dealt with by the same scheme accordingly, provided that (1.) in any scheme relating to such endowment due regard shall be had to the educational

interests of persons of the same class in life or resident within the same particular area as that of the persons who at the commencement of this act are benefited thereby; (2.) no open space at the commencement of this act enjoyed or frequented by the public shall be enclosed in any other manner than it might have been if this act had not passed."

Subsequent clauses contain the procedure for making schemes under the act (sects. 31—51); and certain restrictions are placed on the powers of the Charity Commissioners and the Courts and Judges, during the continuance of the power of making schemes under the act (sect. 52). And the powers of making schemes under the act are not, unless continued by Parliament, to be exercised after the 31st Dec., 1872, or not later than the 31st Dec., 1873, by appointment of Her Majesty in Council (sect. 59).

By the Endowed Schools Acts Amendment Act (37 & 38 Vict. c. 87), the powers of the Endowed Schools Commissioners are transferred to the Charity Commissioners (sect. 1); and the power of making schemes under the Endowed Schools Acts is extended to a period of five years from the 31st of Dec., 1874 (sect. 6).

If however the Endowed Schools Commissioners have not made a declaration under the 30th section of the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), that it is desirable to apply for the advancement of education the income of a charitable endowment not previously applicable to education, the

mere pendency of a scheme before the commissioners is no reason why the Chancery Division should not exercise its jurisdiction to settle a scheme for the management of the charity; but the governing body of the charity ought to have an opportunity of proposing their own scheme in Chambers, in opposition to the scheme of the Attorney-General. *In re Charitable Gifts for Prisoners, Ex parte Governors of Christ's Hospital*, 8 L. R., Ch. App. 199. As to the jurisdiction of the Endowed Schools Commissioners see *In re "The Meyricke Fund,"* 13 L. R., Eq. 269; 7 L. R., Ch. App. 500.

VII. *As to Donations and Bequests to Charitable uses in Ireland.*

The mode in which gifts for pious and charitable uses may be made of realty in Ireland (to which 9 Geo. 2, c. 36, does not apply) is regulated by 7 & 8 Vict. c. 97, intitled, "An Act for the more effectual application of Charitable Donations and Bequests in Ireland;" and which commenced from and after the 1st of January, 1845. It enacts that "No donation, devise, or bequest for pious or charitable uses in Ireland shall be valid to create or convey any estate in lands, tenements or hereditaments for such uses unless the deed, will or instrument containing the same shall be duly executed *three calendar months* at least before the death of the person executing the same; and unless every such deed or instrument, not being a will, shall be duly registered in the office for registering deeds in the city of Dublin, within

three calendar months after the execution thereof" (sect. 16).

And by 30 & 31 Vict. c. 54, the executors or administrators must publish in the *Dublin Gazette* and some local paper advertisements stating the charitable devises or bequests made in any will or codicil (sect. 19); and Registrars of the Court of Probate are to make a return to the Commissioners of Charitable Donations of every charitable donation contained in any will entered in the office of such registrars (sect. 20); and copies of the papers containing the publication of charitable bequests under 30 & 31 Vict. c. 54, s. 19, must be lodged in the office of the Commissioners of Charitable Donations and Bequests (34 & 35 Vict. c. 102, s. 16). See *Robb v. Dorrian*, 11 Ir. R., C. L. 292.

A devise of real estate *in trust to sell* and apply the *proceeds* to charitable purposes is void under 7 & 8 Vict. c. 97, s. 16, if made within three months before the death of the testator. *Donnellan v. O'Neill*, 5 Ir. R., Eq. 523.

On the construction of 7 & 8 Vict. c. 97, s. 15, see *Cullen v. Commissioners of Charitable Donations and Bequests*, 5 Ir. R., Eq. 44.

In Ireland, a gift for pious or charitable uses of a sum of money secured by a subsisting charge on land is not void, even though the donor die within "three months" after the execution of the instrument conveying such gift (*Stewart v. Barton*, 6 Ir. R., Eq. 215). Secus, if the legal estate in the security being in the donor, he use words sufficient to pass such estate. *Ib.*

By 5 & 6 Vict. c. 82, there is an exemption from the charge of duty in Ireland of any legacy given for the education or maintenance of poor children in Ireland, or to be applied in support of any charitable institution in Ireland, or for any purpose merely charitable. Sect. 38.

It has been held, that this exemption applies only where the charitable purpose for which the legacy is given is described in and by the will. *The Att.-Gen. v. Cullen*, 14 Ir. C. L. Rep. 137.

